IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

## No. 71.

NOBLE STATE BANK, PLAINTIFF IN ERROR,

*vs.*

C. N. HASKELL ET AL., DEFENDANTS IN ERROR.

## REPLY BRIEF OF PLAINTIFF IN ERROR AND CONCLUDING REVIEW OF CASE.

### First. Sufficiency of Petition.

On page 112 of the Attorney General's brief he raises the question that the Supreme Court of Oklahoma held that the petition was insufficient, and, while he merely suggests the possibility of this being considered, without insisting upon it, it may be well to briefly reply to the suggestion.

It will be remembered that the trial court overruled the ground of the demurrer raising this question (pp. 22, 24, printed record), and based the decision squarely upon the constitutional question presented.

The Supreme Court likewise based its decision entirely upon the constitutional question presented and merely sug-

gested the other at the conclusion of the opinion, after squarely deciding against the plaintiff in error upon its rights asserted under the Constitution of the United States.

The lower court held with us on the sufficiency of the petition. No cross-appeal was taken. The Supreme Court, therefore, gratuitously held that the petition was insufficient. Under these circumstances, if we are barred from asserting the Federal question, the result is the same as if the courts of the State had purposely sought to evade the jurisdiction of this court.

We do not believe the suggestion of the Attorney General is sustained by the statutes of the United States and the decisions of this court.

Section 709 of the Revised Statutes provides that—

> "A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had, where is drawn in question the validity of * * * a statute of, or any authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity; * * * may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

We have in this case beyond denial a final judgment of the highest court of the State where is drawn in question the validity of a statute of the State and the decision is in favor of its validity. This being true, the statute, in as plain English as the law-makers knew how to use, provides that this decision may be re-examined in this court.

The statute under consideration was construed in the case of Murdock *vs.* Memphis, 20 Wallace, 590, and after an elaborate review and argument, Mr. Justice Miller sums up the opinion of the court in the following passage on page 444 of book 22, lawyers' edition:

> "Finally, we hold the following propositions on this subject as flowing from the statute as it now stands:

1. That it is essential to the jurisdiction of this court over the judgment of a State court, that it shall appear that one of the questions mentioned in the act must have been raised, and presented to the State court.

2. That it must have been decided by the State court, or that its decision was necessary to the judgment or decree, rendered in the case.

3. That the decision must have been against the right claimed or asserted by plaintiff in error under the Constitution, treaties, laws or authority of the United States.

4. These things appearing, this court has jurisdiction and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the State court.

5. If it finds that it was rightly decided, the judgment must be affirmed.

6. If it was erroneously decided against plaintiff in error, then this court must further inquire whether there is any other matter or issue adjudged by the State court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the Federal question. If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue.

7. But if it be found that the issue raised by the question of Federal law is of such controlling character that its correct decision is necessary to any final judgment in the case, or that there has been no decision by the State court of any other matter or issue which is sufficient to maintain the judgment of that court without regard to the Federal question, then this court will reverse the judgment of the State court, and will either render such judgment here as the State court should have rendered, or remand the case to that court, as the circumstances of the case may require."

In Leathe *vs.* Thomas, 207 U. S., 93, 28 Sup. Ct. Rep., 30, Mr. Justice Holmes, in delivering the opinion of the court, on page 32 of the Supreme Court Reporter, says:

> "Of course, there might be cases where, although the decision put forward other reasons, it would be apparent that a Federal question was involved, whether mentioned or not. It may be imagined, for the sake of argument, that it might appear that a State court, even if ostensibly deciding the Federal question in favor of the plaintiff in error, really must have been against him upon it, and was seeking to evade the jurisdiction of this court. If the ground of decision did not appear and that which did not involve a Federal question was so palpably unfounded that it could not be presumed to have been entertained, it may be that this court would take jurisdiction."

See also St. L. S. W. Ry. Co. *vs.* Arkansas, 217 U. S., 136, 30 Sup. Ct. Rep., 476.

That the petition stated sufficient facts to entitle the plaintiff to injunction is manifest when the statute of Oklahoma is read.

Section 4440 of the second volume of Wilson's Revised Statutes of Oklahoma contains the following:

> "An injunction may be granted to enjoin the illegal levy of any tax, charge or assessment, or the collection of any illegal tax, charge or assessment, or any proceeding to enforce the same;" * * *

This section was adopted from the State of Kansas where it had received interpretation prior to its adoption.

In the case of Parker *vs.* Winsor, 5 Kan., 362, on page 366, Judge Valentine says:

> "If the tax is illegal, injunction is no doubt a proper remedy. * * * It is authorized by statute, and therefore it makes no difference what the law would be in the absence of the statute, and for this reason the authorities cited by counsel for plaintiff in error on this point are not applicable. Hence, the only question for us to consider is whether the tax is illegal or not;" * * *

The rule thus laid down is the settled law in the State of Kansas and also in the State of Oklahoma.

Stiles *vs.* Okla., 3 Okla., 26, 35.
A. T. & S. F. R. R. Co. *vs.* Wiggins, 5 Okla., 477, 487.
Wallace *vs.* Bullen, 6 Okla., 17.
Gray *vs.* Stiles, 6 Okla., 455.
Bardrick *vs.* Dillon, 7 Okla., 535, 546.

It will be noted that the language of the statute applies to any illegal tax, charge or assessment.

The purpose of this suit is to enjoin the collection of an illegal "assessment" and section 2 of the act under review repeatedly calls the charge made an "assessment," so that there can be no doubt but that the section of the statute allowing an injunction applies.

It is therefore clear that there is no "sufficient" non-Federal question decided by the Supreme Court on which to rest its judgment, but that it must be rested upon the Federal question involved. In fact, it is squarely rested on the Fedquestion involved. In fact, it is squarely rested on the Federal question and the court does not seek, in any way, to avoid meeting that issue.

**Second.**

We wish to reply to a few of the positions taken and cases cited by the Attorney General.

(*a*) On page 78 of his brief, the Attorney General lays down this proposition:

> "Compulsory support of decayed pilots constitutional,"

and cites Cooley *vs.* The Board of Wardens, 12 Howard, 298.

That is a leading case supporting the right of the States

to regulate pilotage, but it has not heretofore been thought that it supported the doctrine that private property might be taken for private use under a law directly appropriating it, nor has it ever been cited before in support of this proposition.

This proposition was not considered by any one of the justices rendering an opinion in the case, nor was it raised by counsel for Cooley.

The court held that the pilotage law of Pennsylvania did not levy a tax, duty, impost or excise; that it did not regulate commerce; that it did not lay any duty on tonnage; that it did not give a preference to one port over another or require a vessel to pay duties.

Under the judicial system of this country whereby the court decides questions presented and maintains an attitude of neutrality, it is always sufficient reply to say that the point was not raised by counsel or decided by the court.

> Expansion of the Common Law, Pollock, page 32, *et seq.*

The Attorney General says:

> "It may be said that the private property of these pilots was taken to be used for their benefit through compulsory co-operation" (78.)

But it will be observed that no private property of the pilots is taken at all, but the half penalty is imposed upon the vessel for refusing to take a pilot.

The State having the right to regulate pilotage, has the right to require the vessel to take a pilot and the law making the requirement being valid, the State had a right to fix a punishment or penalty for a violation of the law; this punishment was half pilotage to be paid by the vessel and used for the "Society for the relief of distressed and decayed pilots, their wives and children."

The question as to the right of the State to dispose of the

penalties collected by it for infractions of its valid laws was not raised or decided.

It will be borne in mind, however, that the State had the right to regulate pilotage; that the law regulating it was valid; that it did not conflict with the Constitution of the United States and that this was a penalty for violating a valid law.

It will also, of course, be remembered that this case was decided in 1851, long prior to the adoption of the 14th amendment.

(*b*) The Attorney General's next proposition is

> "Compulsory contribution for damages done sheep by dogs constitutional" (79).

Various cases are cited in support of this proposition, but as the Attorney General very frankly says:

> "The direct question of the constitutionality of these acts as against the Fourteenth Amendment is not discussed."

The question not having been raised or decided, the cases are not in point.

In the later case of Fox *vs.* Mohawk & Hudson River Humane Society, 51 L. R. A., 681; 165 N. Y., 517, this question is however raised, discussed and decided.

In the cases cited by the Attorney General the question involved was the validity of a license fee required to be paid by the owners of dogs. Its validity was sustained and has been sustained in a great many other cases.

But in the Fox case, while the validity of a license fee was conceded, the question was raised that these fees were appropriated by the law to private uses and therefore amounted to a taking of property without due process, and this position was sustained by the court.

The court says (51 L. R. A., 686):

> "It is but an exaction of money or property from one citizen and its appropriation to another for its private use. Such is not a valid exercise of taxing power. (Citing cases.) We are of opinion, therefore, that the statute so far as it compels the owners of dogs to pay license fees to the defendant for the purposes prescribed in the statute is an unauthorized appropriation of public moneys, and is in conflict with the Constitution."

In this case the license fees were to be paid to the "Society for the Prevention of Cruelty to Animals," to be used by it in defraying the cost of enforcing the law, in providing shelter for homeless animals, "and for its own purposes."

(*c*) "Quarantine fees valid."

On page 83 of his brief the Attorney General cites the case of Morgan Steamship Co. *vs.* Louisiana Board of Health, 118 U. S., 455, 6 Sup. Ct. Rep., 1114, which upholds the validity of quarantine fees as the rightful exercise of the police power for the protection of health, not forbidden by the Constitution of the United States, but expressly sanctioned by the statutes of the United States.

The attack upon the law was based on the contention that it was a tax upon tonnage and that it was giving a preference to one port over another, both of which positions were denied by the court.

We are unable to see that either the decision or the language of the court has any bearing whatever upon the case at bar.

(*d*) The Attorney General's next contention on page 84 is thus stated:

> "Expense of commissions to supervise public utilities properly placed on utility companies."

And on page 86 he cites "Other incidents of compulsory benefits."

Both of these subdivisions are based on the line of reasoning employed in the Gibbs case, 142 U. S., 386, to which we made full reference on page 67 *et seq.* of our original brief, where we pointed out that the money raised in that case was for a public and not a private purpose; that it was paid to public officers and not to private individuals; that it was a tax which might have been levied upon the people of the whole State, and that it was a mere incident to the regulation of the roads and not a law requiring one person to pay the private debt of another.

These same distinguishing characteristics will apply to the other cases cited by the Attorney General.

(*e*) The Attorney General, on page 89 *et seq.*, refers to a series of cases upholding laws for the compulsory creation of a fund for the benefit of firemen.

In answer to this it is sufficient to say that the authorities do not establish the validity of such laws, as some of the States hold directly opposite to those cited by the Attorney General.

It will be observed, however, that the courts which have upheld this class of legislation have based their decisions upon one of two grounds—either that the law could be applied to foreign corporations as a mere incident to the State's arbitrary right to exclude them from their domain, or that the law was not to be construed as a taking of private property for private use, but for the public benefit.

There are cases, however, which deny the constitutionality of such laws, and so far as we are aware this court has not settled the conflict.

Upon this subject we call the court's attention to the case of Ætna Fire Ins. Co. *vs.* Jones (So. Car.), 59 S. E., 148; 13 L. R. A., new series, 1147.

Accompanying the report of this case in the L. R. A. is a case note collecting the cases for and against this species of legislation, from which it will appear that the States are about equally divided on the subject.

### Third. Banking is Not a Franchise.

In discussing this subject we emphasize the difference between "franchise" as meaning a special governmental privilege—*e. g.*, eminent domain—and "franchise" as meaning—if it does mean—a mere right to organize a corporation under general laws applicable alike to all persons. We will discuss the two shades of meaning in the order stated.

In Bank of Augusta *vs.* Earle, 13 Peters, 519, Mr. Chief Justice Taney defines franchises as

> "Special privileges conferred by the Government on individuals which do not belong to the citizens of the country generally of common right."

This definition has been followed so often and has become so well imbedded in our law that it is unnecessary to cite further authorities.

Pursuant to this principle it has been held that the right of eminent domain is a franchise; that the right to lay gas pipes in the highways is a franchise; that the right to maintain electric wires over or under the streets of a city is a franchise.

It has also been held that the right to engage in the business of banking is a franchise by the Supreme Court of North Dakota in State *ex rel.* Goodsill *vs.* Woodmansee, 1 N. D., 246, 11 L. R. A., 420, 46 N. W., 970, and the Supreme Court of South Dakota has held directly to the contrary in State *vs.* Scougal, 3 S. D., 55, 15 L. A. R., 477, 44 Amer. State Rep., 756, 51 N. W., 858; and in Bank of Cal. *vs.* San Francisco, 142 Cal., 276, 64 L. R. A., 198, 100 Amer. State Rep., 130, 75 Pac., 832, it is said:

> "The mere right to do a banking business is not a franchise in any sense of the word; it belongs to citizens generally, and is a common right in the same sense that the right to do a grocery or dry goods business is available to all citizens and no grant of the sovereign is essential to its existence."

In a note in the L. R. A. accompanying the report of State *vs.* Richcreek (Ind.), 77 N. E., 1085, 5 L. R. A., New Ser., 874, the cases are collected.

It is well settled that the Supreme Court of California stated the rule correctly when it held that the right to engage in the banking business, at the common law, belongs to individual citizens and may be exercised by them at pleasure.

Bank of Augusta *vs.* Earl, 13 Peters, 519, 596.

And it is for this court now to determine whether the legislature by its mere declaration can make a franchise of any business which has always been open to all citizens alike.

There is one characteristic which it seems to us applies to all franchises, namely, they are to a certain extent the exercise of a governmental function. The right of eminent domain; the right to occupy the streets and highways for a special purpose; the right to issue currency are all, in a sense, governmental functions and cannot be exercised without a special grant.

In other words, a franchise is not a common right.

The business of banking has always been a common right.

The legislature has not made franchises by its declaration, because in the nature of things, government or governmental functions inhere in the people and the legislature as the agent of the people has merely granted to individuals that part of the government itself indicated by the right of eminent domain, or the right to occupy the highways for a permanent use.

We do not believe the legislature by its mere declaration

can take from the citizens of a State the right to engage in any common business and make it the exclusive property of the State—a franchise—and thus exclude from its use every person except him to whom the legislature arbitrarily grants it.

In other words, a franchise is not anything which the legislature declares it to be, but a thing which in the nature of organized government inheres in the state and cannot emanate from the State except by its grant.

We presume that the reason underlying the argument of the Attorney General that banking may be made a franchise is that if the right to engage in the business is a privilege which can only be exercised by the consent of the state, that the state may confer the privilege subject to any conditions which it sees fit to impose.

It may be well to inquire for a moment the limits to which this argument would bring us.

If sound, then all business of a public nature is subject to the same rule.

The business of conducting a grain elevator, for instance, is a business of a public nature and subject to regulation by the state.

Munn. *vs.* Ills., 94 U. S., 113.

This is a business co-extensive with the United States and is now and always has been conducted by both individuals and corporations as a matter of common right.

If banking may be declared a franchise, then the operating of elevators may be so declared, and the legislature may provide that elevators shall be operated only by corporations and may impose upon these corporations, as a condition precedent to their exercising the franchise, liability for each other's receipts and mutual responsibility for each other's losses.

The same is true of the business of ginning and com-

pressing cotton. This is a business of a public nature which is regulated throughout the Southern States and in which every individual living in those States is largely interested. If banking may be declared a franchise, then the ginning, baling and compressing of cotton may be so declared, and granted only to corporations upon condition that they guarantee each other's warehouse and compress receipts.

The same applies to life insurance and to fire insurance.

The same reasoning applies to the refining of oil. That is certainly a business of a public nature in which every living man is interested, and, if banking may be declared a franchise, the refining of oil may be so declared and as a condition precedent to any person exercising the privilege, he may be required to sell it at such price as the state may fix, reasonable or unreasonable.

The theory underlying this argument is that a franchise is a privilege conferred by the state, and, that, as a person can only exercise the privilege when he is permitted to do so by the favor of the state, that the state can impose conditions arbitrarily.

Where a state has the arbitrary right to confer a privilege, such for instance as a permit to a foreign corporation to transact business within the State, it has been held that this right is entirely arbitrary and that it may even be granted on condition that it will be revoked if the foreign corporation removes a case to the Federal court.

Security Mut. Life Ins. Co. *vs.* Pruitt, 202 U. S., 246; 26 Sup. Ct. Rep., 619.

If therefore these various departments of activity may be declared franchises, then it follows that the state may confer them or not within its arbitrary discretion, and, this being true, it may confer them upon any condition it chooses to name, and thus may destroy all of the protection afforded by the Constitution of the United States.

A still more serious consequence follows from the fact that if these things may be declared to be franchises, it then is true that they cannot be exercised without an express grant from the state. If the state therefore merely declares that banking is a franchise and does not pass a banking law, it follows that the business cannot be conducted by anyone, corporate or individual.

The same is true of fire insurance; of life insurance; of the elevator business; of the compress business and of every business of a public nature.

The state, by declaring these things to be franchises, and not granting them to any person, destroys the business and thus it follows that the legislature, according to this argument, has the power to destroy the commerce and happiness of the people.

Or, the State might exclude all persons from these franchises, and operate them all itself. If, therefore, the position of the Attorney General is correct, it is possible for the State to monopolize the business of banks, railroads, water works, gas and electric companies, fire and life insurance, elevators, cotton gins and compresses, oil refining and all other business of public consequence.

The fact that our country is not a despotism is sufficient answer to this position.

But it is argued that the business of banking and insurance may be confined to corporations and that, therefore, the grant of corporate charters may contain any conditions which the State may arbitrarily impose.

In this day of multiplied corporations, when every department of commercial activity is in their hands, when general laws applicable to all persons alike contain the corporate grant, and special statutes creating corporations have become obsolete, it may well be doubted whether mere corporate existence should any longer be termed a franchise.

It certainly has few, if any, of the characteristics of a franchise.

Bearing in mind the difference between a franchise in the sense first discussed, and considered as a mere grant of corporate existence under general laws open alike to all citizens, we may concede the Attorney General's argument and yet we do not reach his conclusion. The State has the right to create corporations. In doing so, however, it must not take property for private use without the owner's consent. The State has the right of eminent domain. In exercising it, however, it must not violate the Constitution. The state has the power to levy taxes, but even this power is limited by the Fourteenth Amendment. If, in the exercise of that high degree of sovereignty represented by the right of eminent domain and the taxing power, the State is subject to the Constitution of the United States, it does not seem logical that constitutional safeguards may be circumvented by the device of conferring corporate charters.

The cases which sustain laws limiting insurance and banking to corporations, do so as a necessary means of regulating the business. Regulation is incidental. A particular act, justified as a regulation, cannot, however, be made the basis of further acts which would otherwise be unconstitutional. In other words, each regulation must stand on its own legs. Private property cannot be taken for private use as an incident to a regulation, as a corollary to a corrollary. If so (to use expressive slang) "the tail is made to wag the dog."

One right cannot exclude other rights. They must yield to and harmonize with each other. One must not be given the right of way over all others.

Freedom of interstate commerce, for instance, must not destroy the State's right to protect its game (State *ex rel.* Sily *vs.* Hesterberg, 211 U. S., 31) or preserve its fresh water (Hudson County Water Co. *vs.* McCarter, 209 U. S., 349,

357). So the right of the State to grant corporate charters must not destroy the protection guaranteed life, liberty, and property by the Fourteenth Amendment; and where, in granting a corporate privilege, an unconstitutional agreement is demanded, the agreement will fall, but the privilege will remain.

Home Ins. Co. *vs.* Morse, 20 Wall., 445.
Barron *vs.* Burnside, 121 U. S., 186.

## Fourth. The Act Being Void as to Pre-existing Banks is Void as a Whole.

This follows from the fact that the act is not severable. By section 2 of the act of December 17, 1907, it is provided that the levy for the guaranty fund shall be

> "upon each and every bank organized and existing under the laws of the state."

By the amendment of March 11, 1909, section 320, Snyder's Compiled Laws of Oklahoma, 1909, it is provided:

> "There is hereby levied an assessment against the capital stock of each and every bank and trust company organized or existing under the laws of this State for the purpose of creating a depositor's guaranty fund."

It will be noticed that both of these acts operate directly upon banks already in existence and neither one of them purports to operate upon banks created thereafter.

The court, therefore, cannot read into the law an exception of banks already in existence, because the language of the statute applies directly to existing banks and as under the terms of the act it cannot be said that the legislature would have passed the law without making it applicable to existing banks, the entire law must fall.

Connolly *vs.* Union Sewer Pipe Co., 184 U. S., 540, 22 Sup. Ct. Rep., 431, 441.

## Supplemental Cases.

Since our original brief was filed in this court an opinion has been handed down in the case of Missouri Pac. R. R. Co. *vs.* Nebraska, 217 U. S., 196; 30 Sup. Ct. Rep., 461, which throws additional light upon the subject of taking property for private use.

By a statute of Nebraska the railroad company was required upon certain conditions to extend its side-tracks for the purpose of reaching elevators constructed adjacent to its right of way. In the particular case, it was shown that the cost of extending the track would be about $450, while the annual revenue derived from the shipment of grain would amount to $3,000 (State *vs.* Mo. Pac. R. R. Co., 115 N. W., 614, at page 619) and the State court held that the law as applied to that particular case was a reasonable exercise of the police power.

It was held by this court, however, that the act was unconstitutional, because it amounted to a taking of property for private use, and the following is quoted from the opinion by Mr. Justice Holmes on page 462 of the Reporter:

> "It will have been noticed that there is no provision in the statute for compensation to the railroad for its outlay in building and maintaining the side tracks required. In the present cases, the initial cost is said to be $450 in one and $1,732 in the other, and to require the company to incur this expense unquestionably does take its property, whatever may be the speculations as to the ultimate return for the outlay. Woodward *vs.* Central Vermont Ry. Co., 180 Mass, 599, 602, 603; 62 N. E., 1051. Moreover, a part of the company's roadbed is appropriated mainly to a special use, even if it be supposed that the side track would be available incidentally for other things than to run cars to and from the elevator."

Upon the limit of the power of the legislature to amend charters, we call attention to the case of Woodward *vs.* Central Vt. Ry. Co., 180 Mass., 599; 62 N. E., 1051, cited with approval in the Nebraska case and in which the opinion was delivered by Chief Justice Holmes, then of that court.

In that case a statute of Vermont incorporated the railroad company for the purpose of taking over the property of another railroad company being sold at foreclosure, providing the terms and conditions on which this might be done and reserving the right to alter, amend or repeal the charter. A later statute of the State, purporting to be an amendment, required the new company to pay certain judgments against the old company, and it was contended that this duty to pay could be justified as an amendment, but the court held that this was a taking of property for private use which could not be accomplished by an amendment to the charter, as appears from the following quotation from the opinion:

> "The statute is an attempt to require private property to be applied to a private use, and therefore encounters those provisions of the Vermont constitution which declare the right to possess property and, by making express provisions for compensation, &c., 'whenever any person's property is taken for the use of the public' impliedly prohibit the taking of it for uses not public. Vt. Const., c. 1, arts. 1, 2, 9; Williams *vs.* School Dist., 33 Vt., 271; Tyler *vs.* Beacher, 44 Vt., 648, 651; 8 Amer. Rep., 398; Quinby *vs.* Hazen, 54 Vt., 132, 140; Snow *vs.* Town of Sandgate, 66 Vt., 451, 29 Atl., 673; Talbot *vs.* Hudson, 16 Gray, 417, 421. We presume that these provisions would not be limited by construction to cases where the statute identified the specific property taken, but would apply equally where the act required some property to be appropriated to the specified use. Indeed, as in this case the appropriation is to be in the form of money, the further question

is raised whether even if the use were public the taking of property in that form is within the power of the State. Cary Library *vs.* Bliss, 151 Mass, 364, 378, 379; 25 N. E., 92; 7 L. R. A., 765.

"It follows that the statute is void unless it is saved by the reservation of the power to amend the charter in the original act. We are of the opinion that it is not saved. No doubt under a general reservation of such power amendments have been held valid which directly affected the property of a corporation by cutting down the tolls which the charter allowed it to charge, or by increasing the share of profits which the charter required it to pay over to another institution. Parker *vs.* Railroad, 109 Mass., 506; Mass. Gen. Hospital *vs.* State Mutl. Life Assur. Co., 4 Gray., 227, 234; but cases like these are in the strictest and most liberal sense amendments of the charter, and do not lead to the conclusion that the power to take away property rights is unlimited. The contrary proposition of Chief Justice Shaw now is accepted by most courts as elementary law. An unqualified power to amend authorizes a modification of the franchise conferred, but does not authorize a departure from the general restrictions on legislation with regard to property acquired and owned by the company, by the device of inserting a confiscation clause in the charter by way of amendment. Com. *vs.* Essex, 13 Gray., 239, 253; Sinking Fund cases, 99 U. S., 700, 720, 741, 758; 25 L. Ed., 496; City of Detroit *vs.* Detroit & H. Plank Road Co., 43 Mich., 140, 147; 5 N. W., 275; People *vs.* O'Brien, 111 N. Y., 1; 18 N. E., 692; 2 L. R. A., 255; 7 Amer. State Reports, 684; Dow *vs.* Northern R. R., 67 N. H., 1; 36 Atl., 510. See Attorney General vs. Railroad Co., 160 Mass., 62; 35 N. E., 252; 22 L. R. A., 112."

## Concluding Review of Case.

*First.*

The property of the bank is taken from it by the law.

*Second.*

This taking is for a private use.

Savings & Loan Ass'n *vs.* Topeka, 20 Wall., 655.
State *vs.* Osawkee Township, 14 Kan., 418.
Lowell *vs.* Boston, 111 Mass., 454.
B. & E. S. Ry. Co. *vs.* Spring, 80 Md., 510.

The test is whether the property taken is directly devoted to the use of the public, and not whether the public is benefited by the use.

Lowell *vs.* Boston, *supra.*

*Third.*

Property cannot be taken for private use in the exercise of the right of eminent domain, even when part of the property taken is needed for public use.

Matter Albany St., 11 Wend., 149.
Embury *vs.* Conner, 3 N. Y., 51.
1 Lewis, Em. Dom., §204.

*Fourth.*

Property cannot be taken for private use under the taxing power.

Cases cited *supra* under "Second."

*Fifth.*

Property cannot be taken for private use in the exercise of the police power.

(*a*) Classifying a statute as an exercise of the police power does not save it if it is in conflict with the Constitution.

Cases cited on page 35 *et seq.* of our original brief.

(*b*) Regulating railroads is clearly an exercise of the police power, but in so doing the State cannot do anything which takes for private use the smallest part of the railroad's property.

Atty. Gen. *vs.* B. & A. Ry. Co. (Mass.), 35 N. E., 252.
A., T. & S. F. Ry. Co. *vs.* Campbell, 61 Kans., 439.
Mays *vs.* Seaboard Air Line Ry. (S. C.), 56 S. E., 30.
Mo. Pac. Ry. Co. *vs.* Nebraska, 164 U. S., 403.
Same *vs.* Same, 217 U. S., 196.
Page 59 *et seq.*, of our original brief.

The Gibbs case, 142 U. S., 386, does not support a different doctrine.

Page 67, original brief.

*Sixth.*

Private property cannot be taken for private use by the amendment of corporate charters.

Woodward *vs.* Central Vt. Ry. Co., 180 Mass., 599.
L. S. & M. S. Ry. Co. *vs.* Smith, 173 U S., 684.
A., T. & S. F Ry. Co. *vs.* Campbell, *supra.*
Mays *vs.* Seaboard Air Line Ry., *supra.*
Page 69 *et seq.* of our original brief.

The requirement of cash reserves, limitations on loans, and similar regulations of banking operations are free from

the fundamental objection to the law under consideration. They do not take the property of the bank for private use without its consent. These regulations fall within the maxim *"sic utere tuo ut alienum non lædas."*

Original brief page 30, *et seq.*

*Seventh.*

Private property cannot be taken for private use by the device of declaring the right to engage in the particular business a franchise and granting the franchise only on condition that the grantee consent to the spoliation.

See subheading "Banking is not a franchise" in this brief.

Respectfully submitted,

C. B. AMES,
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T. G. CHAMBERS,
*Attorneys of Plaintiff in Error.*

# APPENDIX.

This appendix is in addition to the appendices in the brief of the defendants in error.

The section of the act, as pleaded in the original petition was amended, on the 11th day of March, 1909, and now stands as follows (sec. 320, Snyder's Compiled Laws, 1909):

> "*Assessment for Guaranty Fund.*—There is hereby levied an assessment against the capital stock of each and every bank and trust company organized or existing under the laws of this State, for the purpose of creating a depositor's guaranty fund equal to five (5) per centum of its average daily deposits during its continuance in business as a banking corporation. Said assessments shall be payable one-fifth during the first year and one-twentieth during each year thereafter until the total amount of said five (5) per centum assessment shall have been fully paid: *Provided, however,* That the assessments heretofore levied and paid by banking corporations or trust companies now existing shall be deducted from and credited as a payment on said five (5) per centum assessment hereby levied. The average daily deposits of each bank during the preceding year prior to the passage and approval of this act shall be taken as the basis for computing the amount of the first payment on the levy hereby made. One year after the passage and approval of this act, and annually thereafter, each bank and trust company doing business under the laws of this State shall report to the Bank Commissioner the amount of its average daily deposits for the preceding year, and if such deposits are in excess of the amount upon which the first or subsequent payment of the levy hereby made is computed, each bank or trust company having such increased deposits shall immediately pay into the depositor's guaranty fund a sum sufficient to pay any deficiency on said first or subsequent payment, as

shown by such increased deposits. After the five (5) per cent assessment hereby levied shall have been fully paid up, no additional assessments shall be levied or collected against the capital stock of any such bank or trust company, except emergency assessments hereinafter provided, to pay the depositors of failed banks, and except assessments as may be necessary by reason of increased deposits to maintain such fund at five (5) per centum of the aggregate of all deposits in such banks and trust companies doing business under the laws of this State. Whenever the depositors' guaranty fund shall become impaired or be reduced below said five (5) per centum by reason of payments to depositors of failed banks, the State Banking Board shall have the power, and it shall be their duty, to levy emergency assessments against the capital stock of each bank and trust company doing business in this State sufficient to restore said impairment or reduction below five (5) per cent; but the aggregate of such emergency assessments shall not in any one calendar year exceed two (2) per centum of the average daily deposits of all such banks and trust companies. If the amount realized from such emergency assessments shall be insufficient to pay off the depositors of all failed banks having valid claims against said depositors' guaranty fund, the State Banking Board shall issue and deliver to each depositor having any such unpaid deposit, a certificate of indebtedness for the amount of his unpaid deposit, bearing six (6) per cent interest. Such certificates shall be consecutively numbered and shall be payable upon the call of the State Banking Board in like manner as State warrants are paid by the State Treasurer in the order of their issue out of the emergency levy thereafter made; and the State Banking Board shall from year to year levy emergency assessments as hereinbefore provided against the capital stock of all banking corporations and trust companies doing business in this State until all such certificates of indebtedness with the accrued interest thereon shall have been fully paid. As rapidly as the assets of failed banks are liquidated and realized upon by the Bank Commissioner, the

same shall be applied first after the payment of the expense of liquidation to the repayment of the depositors' guaranty fund of all money paid out of said fund to the depositors of such failed bank, and shall be applied by the State Banking Board towards refunding any emergency assessment levied by reason of the failure of such liquidated bank. *Provided further,* That seventy-five per cent of the depositors' guaranty fund shall be invested for the benefit of said fund in State warrants or such other securities as State funds are now required to be invested.

No. [redacted]

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1908.

Noble State Bank, a Corporation,
*Plaintiff in Error,*

vs.

C. N. Haskell, G. W. Bellamy, J. P. Commons, J. A. Menefee, M. E. Trapp and H. H. Stinch,
*Defendants in Error.*

## BRIEF OF DEFENDANTS IN ERROR.


CHARLES WEST,
*Attorney General.*

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*Assistant Attorney General of the State of Oklahoma,*
*Attorneys for Defendants in Error.*

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Noble State Bank, a Corporation,
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*Defendants in Error.*

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## BRIEF OF DEFENDANTS IN ERROR.

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### I. STATEMENT.

To the statement contained in the brief of the Plaintiff in Error, the Defendants in Error wish to add the following:

a. To set out "Exhibit D" of the original petition mentioned on page 4 of the brief of the Plaintiff in Error, which appears on page 17 of the record, which is as follows:

"EXHIBIT D."

Lieutenant Governor Geo. W. Bellamy, Chairman
Roy C. Oakes, Secretary.

MEMBERS OF STATE BANKING BOARD.

Charles N. Haskell, Governor.
J. P. Connors,
Chairman Board of Agriculture.
J. A. Menefee, State Treasurer.
M. E. Trapp, State Auditor.

STATE BANKING BOARD.

State of Oklahoma.

Guthrie, Okla., Feb. 11, 1908.

Noble State Bank, Noble, Oklahoma.

Gentlemen: The assessment under the Depositors' Guaranty Act of the legislature, will be made on Friday, February 14th, 1908. At that time the State Banking Board will decide what proportionment of said assessment will be called.

You should have your check here on that day for 50 per cent of your assessment.

Your average deposits for the year 1907 is $33.147.00.

Fifty per cent of your assessment would be $156.73.

Your certificate will be sent you in time so that you should receive it not later than Monday, February 17th, 1908, provided that your check is here by Friday, February 14th, 1908, and the Bank Commissioner approves your bank.

Respectfully,

ROY C. OAKES, *Secretary.*

b. That demurrers of the defendants to the petition in the lower court raised three objections, the third of which was:

*Because the petition did not state facts sufficient to constitute a cause of action.*

See pages 18, 19 and 20 of the printed record, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46 of the original record.

The trial court sustained the demurrers as to the third ground to which plaintiff excepted, and brought the case to the Supreme Court of the State of Oklahoma for review on this ruling on the demurrer (see page 22 of the printed record, 48, of the original record). In the Supreme Court of Oklahoma it was held:

1. The Supreme Court held that the banking act was constitutional.

2. That the original petition in the lower court did not state facts sufficient to constitute a cause of action.

## II. ASSIGNMENT.

As to the assignments of error, they are substantially as to:

1. The constitutionality of the act which involved Federal quetsions.

2. But in addition the court based its decision on the sufficiency of the petition, which was a non-Federal question unless this decision itself was the taking of property without due process.

## III. POINTS OF LAW.

On pages 9 and 10 of the brief of the Plaintiff in

Error particular attention is called to the following features of the law:

## ULTIMATE QUESTIONS.

1. It is alleged that:

"The assessment is compulsory, not voluntary."

We answer it is such involuntary co-operation as in due course of law, without denial of the equal protection of the law, under its police power to regulate banking, the State, through the legislature, was authorized to establish.

2. It is alleged that the assessment is:

"Entirely unlimited and may take all of the assets of the bank."

We answer that the assessments are limited to a figure such that the fund shall be one per cent of the total deposits in all the banks subject to the act. (Sec. 2, House Bill 11-A, approved December 17th, 1907.)

3. It is alleged that the law:

"Does not operate simply upon banks chartered or re-chartered after its passage, but upon all banks both old and new."

We answer that if properly within the police power as to new banks, it is thus also as to old banks; because no charter could grant away the right to place it as a modification if properly police power.

4. It is alleged that:

"The fund raised is not applied to any governmental purpose but is donated to private citizens who happen to be depositors of an insolvent bank."

We answer that the security of the public in its dealings with banks is a governmental function, and that the creation of a mutual reserve fund is a safety to the public and a compulsory benefit to the banks.

PRINCIPLE AUTHORITIES.

1 Banking defined:

*Kiggins vs. Munday*, 52 Pac., 855, at p. 856, 19 Wash., 233.

*Niagara County Bank vs. Baker*, 15 Ohio St., 68, at p. 87.

*American National Bank vs. Morey*, 69 S. W., 759, p. 760, Law Rep. 658, 58 L. R. A., 956.

*Patterson vs. Marine National Bank*, 130 Pa., 419; 17 Am. St. Rep., 778.

*Houston vs. Braden*, 37 S. W., 467; p. 468.

*Peoples Bank vs. Le Grand*, 103 Pa., 309; at p. 314; 49 Am. Rep., 126.

3. Issue of circulation of franchise:

*Bank of Augustus vs. Earle*, 13 Peters, 519, at p. 596.

*Meyers, et al. vs. Manhattan Bank*, 20 Ohio, 295.

4. Proper exercise of police power:

*Freund.* Sections 400, 401 and 40.

9. Banking public business:

*Munn vs. Illinois*, 94 U. S., 113.

*State vs. Rich Creek*, 5 L. R. A. (N. S.), 875.

10. Constitution liberally construed:

*Gibbons vs. Ogdon*, 9 Wheat., 187.

12. The law valid unless plainly invalid:

*Hylton vs. U. S.*, 3 Dall., 171, p. 175.

15. Modification of common law rule not deprivation of property:

*Munn vs. Illinois*, 94 U. S., 113.

*Goodsil vs. Woodmanse*, 11 L. R. A., 421.

*Charlotee, etc. Railroad vs. Gobbes*, 142 U. S., 386

*Cooley vs. The Board of Wardens*, 12 How., 298.

*Tenney vs. Lentz*, 16 Wis., 566.

*Vanhorn vs. People*, 46 Mich., 183.

*Holst vs. Row*, 39 Ohio St., 340.

*The Town of. Wilton vs. The Town of Weston*, 48 Conn., 325.

*Morgan Co. vs. La. Board*, 118 U. S., 455.

*N. C. St. L. R. R. vs. Al.*, 128 U. S., 98.

*Mobile vs. Kimball*, 102 U. S., 691.

*New York vs. Squire*, 145 U. S., 175.

*Head vs. Amoskeag Manufactory Co.*, 113 U. S., 9.

*Wurtson vs. Hoagland*, 114 U. S., 606.

*State vs. Board*, 87 Minn., 325, 92 N. W., 216.

*Swift vs. Calnan*, 102 Iowa, 136; 37 L. R. A., 462.

*Firemen vs. Louisburg*, 21 Ill., 511.

*Milwaukee vs. Helfenstein*, 16 Wis., 142.

*Firemen vs. Roome*, 93 N. Y., 313.

*Phoenix Co. vs. Montgomery*, 42 L. R. A., 468.

27. Can all banking be made a franchise.

*Zane on Banking*, Sec. 7 to 15.

*Morse on Banks*, Sec. 13.

*State vs. Woodmanse*, 11 L. R. A., 420.

*Myers vs. Manhattan Bank*, 20 Ohio, 295.
*State vs. Stebbins*, 1 Stewart, 299.
*Allnutt vs. Inglis*, 12 E., 527.
*Munn vs. Ill.*, 94 U. S., 113. Hale de Portibus Maris, 1 Harg Law Tracks, 78.

29. Exercise of police power violates no vested rights:
*Sioux City Co. vs. Sioux City*, 138 U. S., 98.
*N. Y., N. H. Co. vs. Bristol*, 151 U. S., 556.
*N. Y., N. H. vs. Com.*, 200 U. S., 361.
*Cummings vs. Spaunhorst*, 5 Mo. App., 21.
*Attorney General vs. Insurance Co.*, 82 N. Y., 172.

## ARGUMENT.

### 1. WHAT IS BANKING?

A statement of the objects of banking, the different manifestations of its functions, and the relation of each to the citizens of the country, will present a clearer view of the points of law.

Banking consists:

1. Of issuing circulating medium.

2. Of selling and buying exchange.

3. Of receiving deposits and holding them subject to order.

4. And of the investment or loaning of the assets of the bank.

In *Kiggins vs. Munday*, 52 Pac., 855, at p. 856, 19 Wash., 233, it is said:

"The bank is an institution for the custody and loan of money, the exchange and transmission of the same by means of bills and drafts, and the issuance of its own promissory notes payable to bearer, as currency, or for the exercise of one or more of these functions."

In the case of *Niagara County Bank vs. Baker,* 15 Ohio St., 68, at page 87, an additional point was emphasized:

"Banks are establishments intended to serve for the safe custody of money, and to facilitate its payment by one individual to another, and sometimes for the accommodation of the public with loans."

And the special nature of the bank must be borne in mind.

In *American National Bank vs. Morey,* 69 S. W., 759, 24, Ky., Law. Rep. 658, 58 L. D. A., 956, citing:

*Patterson vs. Marine National Bank,* 130 Pa., 419, 17 Am. St. Rep., 778.

It was said:

"A bank is an institution of a quasi-public character. It is chartered by the government for the purpose, *inter alia* of holding and safekeeping the moneys of individuals and corporations. It receives such moneys on an implied contract to pay the depositors' checks on demand."

And it was pointed out in:

*Houston vs. Braden* (Tex), 37 S. W., 467, p. 468.

*Peoples Bank of Wilkes Barre vs. Le Grand,* 103 Pa., 309, p. 314; 49 Am. Rep., 126.

"A bank deposit is different from an ordinary loan, in this: From its very nature, it is customarily subject to the check of the depositor and is always payable on demand."

## 2. WHAT IS REGULATED.

CIRCULATION. The issuance of circulating medium has always been recognized as subject to regulation or even destruction by the government; the national tax on the circulation of state banks amounting to the latter.

EXCHANGE. The selling and buying of exchange is, generally speaking, a private transaction. The bank's dealings in this capacity have generally been left free to the operation of business laws and conventions without the intervention of statutes.

DEPOSITS. The receiving of money on deposit has always been recognized as a public function and has been from time immemorial subjected to numerous regulations for the safety of the public, the depositors and the stockholders.

LOANS. The loaning of the assets of th ebank are customarily regulated by laws prohibiting the loaning of a greater sum to any person than safety for the depositors of the bank would suggest. Government regulation on this subject is too well known to need further mention.

## 3. DEVICES TO THAT END.

The various devices adopted for the making safe of bank deposits were:

### (A) RESTRICTING CIRCULATION.

In the first place laws restricting the issuance of circulation and attaching conditions to the same—notably, in

laws making the issuance of circulating medium a franchise or privilege and restricting its use to particular corporations established for that purpose in the State or Nation. The constitutionality of this regulation has everywhere been upheld or taken for granted. See:

*Bank of Augusta vs. Earle,* 13 Peters, 519, 596; 10 Law Ed., 274, 311.

*Meyers, et al. vs. Manhattan Bank,* 20 Ohio, 295.

*People vs. Barton,* 6 Cow., 290.

*People vs. Brewster,* 4 Wend., 498.

*Pennington vs. Townsend,* 7 Wend., 276.

(B) SAFETY FUND FOR CIRCULATION.

NATIONAL BONDS FOR CIRCULATION SELF SECURING. Furthermore, the particular method of protecting the public in the issuance of banking circulation by the creation of a safety fund for the security of the same was a frequent manifestation in the banking laws of the States of the Union from about 1830 until the passage of the act taxing the State circulation to its annihilation, which taxation retarding, as it did, the State circulation, rendered useless the laws creating safety funds for the preservation of the same. But the method has been preserved in the Federal law requiring bonds of the United States to be deposited as a safety fund for the protection of the circulation to be issued by the National banks.

NEW YORK, INDIANA, OHIO, IOWA, MUTUAL SECURING. Financial and Currency Principles, Report No. 5629 of the Fifty-ninth Congress, second session, contained in the Report of the Committee on Banking and Currency, House Report No. 12677, at pages 128 to 135, particularly on pages 130, as to New York; 131, as to Indiana; 132, as to Ohio, and 134, as to Iowa, mention the widely accepted character of such legislation when created as a security for circulation.

## (C) OTHER DEBTS. DEPOSITS.

NEW YORK, VERMONT, INDIANA. The safety fund created by the laws of the State of New Lork, by the laws of the State of Vermont, by the laws of the State of Indiana, Ohio and Iowa, and the Territory of Michigan, had, in addition to the principle of a safety fund, the principle of involuntary co-operation or mutual insurance, and in the case of New York, Vermont, Indiana, the safety fund was applicable not only for the redemption of the circulation, but also all other debts of the bank, including sums due to depositors. But the safety of the circulation was the matter whose preservation the legislation generally sought rather than the security of the deposits, for the reason that in the days when bank circulation was not taxed, the utility of circulation being so apparent, if the circulation of the banks which could issue it was kept safe, it followed in a business sense as a necessity that the deposits would also be safe.

## (D) EXAMINERS.

When, therefore, the circulation of State banks was put an end to, the usefulness of a safety fund as a guaranty of deposits was not so clearly appreciated, and this particular plan for the regulation of banking passed out of use. There grew up with the creation of the safety fund of the State banks and also of the national institutions a set of regulations to preserve the bank, not by insurance, which the safety fund was, but by setting a watch over the action of its officers through the examination by National or State bank examiners in the respective State and Federal systems. There is, in principle, no difference between putting a watchman over the building for its safety and a policy of insurance to accomplish the same object. The safety fund passing out of use, chief reliance was put upon the work of the examiner, and for his benefit there were enacted numerous special provisions dealing with the transactions of the bank as to when, whether and how its officers should handle its assets; when and how it could receive deposits; to what extent it should make loans; when and how it should make reports to the bank examiner; when an examiner for the State or the comptroller of the Nation was authorized to suspend the banking of any particular corporation guilty of an infraction of the banking laws.

## (E) RESERVES.

Among the various schemes devised was that seen in frequent State legislation, and also in that of the Nation,

to create a reserve fund. It was supposed that the reserve fund would be cash on hand to meet the strain of unforeseen emergencies. But because money held in reserve drew no interest and was unprofitable, the reserve was deposited in the reserve center, where it drew interest, and would, theoretically, be subject to instant use. But when, as in October, 1907, the reserve centers, and the chief center, the City of New York itself was the hotbed of banking troubles, the futility of the reserve system became apparent, and in the State of Oklahoma, by the law under discussion, an attempt has been made to go back to the safety fund exemplified in the State banking laws of ante-bellum days.

If the creation of a reserve fund by the State for each bank is a proper exercise of police power, and it has never been questioned, the only contention that would remain would be whether a mutual reserve or safety fund by involuntary co-operation is within the power of legislation.

All these phenomena named were so well known as to make citation unnecessary, but a mention is necessary to a proper understanding of the Oklahoma act, because the latter embodies remnants of all of these various devices, excpt a safty fund ior the redemption of circulation.

The act is set out in full in an appendix to this brief, but in particular it is necessary to note that the act of 1907 is a part of the Statutes of Oklahoma Territory of 1899.

4. OTHER OKLAHOMA DEVICES.

(A) OFFICIALS BONDED. Section 10 of the

Statutes of 1899 on Banks and Banking provides that a bond shall be required of the cashier and any and all officers having the care and handling of the funds of the bank. This is a regulation of the banking business and a control of its management.

(B) STOCKHOLDERS' LIABILITY. Section 11 of that act puts the stockholders under a double liability.

(C) REGULATION OF LOANS. Section 12 puts a restriction upon the business in that it forbids the employment of the bank's funds in trade, by buying wares, forbids the investment in the stock of other banks or to make any loan on its stock of other banks or to make any loan on its stock as security.

(D) RESERVES. Section 13 has become Section 15 of the laws of December 17, 1907, and provides the amount of reserves that banks shall keep on hand.

(E) LIMITING LOANS. Section 14 has become Section 16 of the Act of December 17, and limits the amount of liability to any bank from any one person.

(F) RESTRICTING TO CORPORATIONS. Section 17 makes banking a franchise.

(G) REPORTS. Section 18 requires reports

(H) SCRUTINY OF DIRECTORATE. Section 12 of the Act of December 17th requires certain qualifications in a person to be a director.

(I) REGULATES OFFICIALS. Section 13 of that Act forbids any active managing officer from borrowing of his bank.

(J) COMMISSIONERS POWERS. Section 18 of that Act lodges in the hands of the bank commissioner the authority and power to regulate and control the bank for the protection of the stockholders an dthe depositors, in allowing him to remove from office any dishonest, reckless or incompetent officer or employee.

## 5. HOW REGULATIONS JUSTIFIED.

These provisions are all of a like character with that requiring a safety fund.

Freund on Police Power says, Section 400:

"When we examine the nature of the restrictions on the business of banking and insurance, we find that they nearly all aim at the losses resulting from insolvency of the bank or insurance company. This loss is to be averted by insisting upon some guaranty of financial stability. Provisions of this character are not absolutely confined to banking and insurance; in some states railroad or other public service corporations may not issue securities without complying with prescribed conditions, or without the consent of designated authorities; and the power of corporations to borrow may be generally limited. But in the case of banking and insurance they are not necessarily confined to corporations, and by far exceed the financial regulations imposed upon any other kind of business. While all the provisions furnish protection against fraud, they do not pretend to be limited to guarding against that danger, but plainly seek to prevent mere improvidence or inadequacy of resources.

The justification for this must be found in the peculiar nature of the business regulated; both banks and insurance companies deal in their own credit, while they receive cash; and, in addition, banks and life insurance companies are the depositories of a large proportion of the savings of the people, so that the management of each institution affects a considerable part of the public. These conditions create a special public danger, requiring a more incisive exercise of the police power than is called for in an ordinary business."

Section 401:

"Banking and insurance being peculiarly affected with a public interest, it follows that the right to carry on either business may be made to depend upon the compliance with certain conditions; and a license may be required as evidence of compliance. In New York, in the case of savings bank and trust companies, the authorization is only given upon ascertaining that the general fitness of the organizers for the discharge of the duties appertaining to the trust is such as to command the confidence of the community, and that the public convenience and advantage will be promoted by such establishment."

In Section 40 the same author says:

"Somewhat related to the requirement of a license is that of a bond or deposit to secure the faithful compliance with police regulations, and the satisfaction of liabilities that may arise from their violation, or to serve as an indemnity fund for persons who have suffered by the fraudulent conduct of business. As a subsidiary measure of police control it appears to be permissible wherever a license may be required, but it is resorted to less frequently. A bond is required not uncommonly the liquor sellers and of auctioneers; deposits are sometimes required of peddlers, itinerant merchants, of persons advertising bankrupt sales, above all of persons or corporations engaged

in the quasi-public business of banking, insurance, or warehousing."

## 6. THE PARTICULAR PROVISIONS AS TO THE SAFETY FUND.

On the 17th of December, in response to a message of the Governor to the legislature, there had been passed and was then approved by the Governor, House Bill No. 11-A, providing for the Depositors' Guaranty Fund, which appears in full in "Appendix A." House Bill No. 333, amending the banking law, approved February 12, 1908, it is also necessary to consider in this case, and that is set out in full in "Appendix B."

The main points to be considered in addition to those named above are: That this law created a banking board composed of the Governor, Lieutenant Governor, President of the Board of Agriculture, State Treasurer and State Auditor (Section 1), and provided this Board should levy an assessment against the capital stock of one per cent of the bank's daily average deposits, less the deposit of the State funds, upon each and every banking organization existing under the laws of the State, for the purpose of creating a Depositors' Guaranty Fund; and that it was the duty of said Board to keep the fund of one per cent of the total deposits in all of the said banks, and for that purpose to levy special assessments when necessary.

Section 6 provided that if the Bank Commissioners should take possession of any bank he should pay the de-

positors in full, and that when the available assets were insufficient to discharge the obligations to depositors that he should draw upon the Banking Board, and that the Depositors' Guaranty Fund should have a first lien upon the assets of such bank to pay all such advancements.

Section 8 provided that the Bank Commissioner, or his assistants, should investigate each bank at least twice each year, and as much oftener as was deemed necessary.

Section 11 provided that if after the Commissioner should have taken possession of any bank if the stockholders were able to repair its credit they might do so and continue to do business.

7. PERTINENT CONSTITUTIONAL PROVISION.

These provisions must be read in the light of the Oklahoma Constitution.

The Constitution provides, Sec. 1, Art. 14:

"General laws shall be enacted by the legislature providing for the creation of a banking department to be under the control of a bank commissioner * * * with sufficient power and authority to regulate and control all State banks * * * under laws which shall provide for the protection of depositors and individual stockholders."

8. ,DOES THE BANK ACT CONFORM?

The question is, do the provisions of the law above cited come within the meaning of this section of the constitution. This section of the constitution must be taken as enumerating rather than defining the nature of the laws

and the bank commissioner's duties.

"A constitution must necessarily be an instrument which enumerates rather than defines, the powers granted by it."

*Grier, J., Passenger Cases,* 7 How., 459.

In *Bank vs. Deveaux,* 5 Cranch, 87, Chief Justice Marshall said:

"A constitution, from its nature, deals in generals, not in detail. Its framers cannot perceive minute distinctions which arise in the progress of a Nation, and therefore confine it to the establishment of broad and general principles."

This, then, is the object of Section 1, Article 14, of the Constitution, that the Bank Commissioner shall have power and authority to regulate and control, under laws which shall provide for the protection of depositors and individual stockholders. It must not be supposed that an attempt is made to define, but simply to enumerate—not an attempt to give details but only generalities.

It is generally supposed that the authority of a State legislature differs in this from that of Congress; that the power of the latter is one of grant; the power of the farmer is all that is not prohibited; that a legislature may do all the Constitution of the State and of the United States does not forbid, whereas, Congress can only exercise those powers granted or those necessarily implied to those granted. And it is loosely said that there is no limitation on the powers of the State. The true situation is clearly stated by Waite, Chief Justice, in *East St. Louis vs.*

*Amy*, 120 U. S., 603:

"Undoubtedly a State Constitution is in a sense a limitation on the powers of the State government. It is the act of the people establishing a fundamental law for their own government as a member of a political community, or as a State of the United States, and it fixes the powers of that government. But this does not imply that the people cannot in such a fundamental *law regulate as they please the powers of the political subdivisions or municipal corporations of the State.*"

No question can be made in the way of contracting this grant of power in the Constitution.

"The people of the State created, the people of the State can only change, its Constitution. Upon this power there is no other limitation but that imposed by the Constitution of the United States; that it must be of representative form."

*Iredell, J., Chisholm vs. Georgia*, 2 Dall., 448.

## 9. ALL BANKING IS PUBLIC BUSINESS IN OKLAHOMA.

This Constitutional provision differs so far as we know from all other Constitutional provisions. It definitely makes banking a public business in that it provides that a State officer shall regulate and control. It does not say how he shall regulate and control, therefore, the legislature alone, or the people, can limit the regulation o rcontrol. The general object of regulation or control shall be the protection of depositors and individual stockholders, and whether the law shall have that effect or not, being a political question,

is only for the legislature or the people.

It will be said that this is a new, untried scheme. It was said about the Constitution of the United States, however, by one of the most conservative judges:

"The Constitution has proceeded upon a theory of its own, and given or withheld powers according to the judgment of the American people, by whom it was adopted." *Story, J., Martin vs. Hunter,* 1 Wheat., 346.

Therefore, the court should not look upon Section 1, Article 14, of the Constitution with suspicion if it seems new. In any event it is to be construed as broadly and generously as if an everyday affair.

## 10. CONSTITUTION TO BE CONSTRUED AS BROADLY AS OKLAHOMA COURTS HOLDING.

Now as to the construction of this provision. The same rule must be adopted as that adopted for the construction of the Constitution of the United States. It is:

"The object of the commission, as applied to a Constitution, is to give effect to the intent of its framers and of the people in adopting it. This intent is to be found in the instrument itself, and when the text of a Constitutional provision is not ambiguous, the Courts, in giving construction thereto are not at liberty to search for its meaning beyond the instrument."

*Lamar, J., Lake Co. vs. Rollins,* 130 U. S., 670.

"The true spirit of Constitutional interpretation in both directions is to give full, liberal construction to the language, aiming to show fidelity to the spirit and purpose."

*Brewer, J., Fairbank vs. United States,* 181 U. S., 289.

Again:

"Limitations of a power furnish a strong reason in favor of the existence of that power."

*Marshall, Chief Justice, Gibbons vs. Ogden,* 9 Wheat, 200.

The objects of Section 1 Article 14 are, therefore, most important to consider. Full efficacy should be given to every grant.

"The grants of power should be so construed as to give full efficacy to those powers and enable Congress to use such means as it deems necessary to carry them into effect, so in like manner a restriction should be enforced in accordance with its letter and spirit, and no legislation can be tolerated which, although it may conflict with the letter, destroys the spirit and purpose of the restriction imposed."

*Brewer, J., in Fairbank vs. United States,* 181 U. S., 290.

And again:

"The words expressing the various grants in the Constitution are words of general import and are to be construed as such, and as granting to the full extent the powers of the Congress of the United States. The presumption, as has frequently been said, is in favor of the validity of the act, and it is only when the question is free from any reasonable doubt that the court should hold an act of the law-making power of the nation to be in violation of that fundamental instrument upon which all the powers of the government rest." Mr. Justice White in *Buttfield vs. Stran-*

*ahan,* 192 U. S., 470, 48 L. Ed., 525, 24 Sup. Ct. Rep., 349, named."

*Brewer, J., idem.*

11. LEGISLATURE TO CHOOSE MEANS.

In construing Section 1, Article 14, the legislature itself must determine what is the best way to protect depositors and individual stockholders. As to the similar authority of Congress, Brewer, J., in *Fairbank vs. United States,* 181 U. S., 290, said:

"That the grant of powers should be construed * * to enable Congress to use such means as it deems necessary to carry its powers into effect."

And again:

"It is not every hardship that is unjust, much less that is unconstitutional; and certainly it would be anomalous for us to hold an act of Congress invalid merely because we might think the provisions harsh and unjust."

*Strong, J., Legal Tender Cases,* 12 Wall., 552.

And again:

"If * * * the legislature of the Union, or the legislature of any member of the Union, shall pass a law, within the general scope of their Constitutional power, the court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice."

*Iredell, J., Calder vs. Bull,* 3 Dall., 399.

In *Gibbons vs. Ogden,* 9 Wheat, at page 187, Chief

Justice Marshall laid down the model for a consideration of powers of this kind. He was there talking about the power of Congress to regulate interstate commerce and in speaking of the Constitution he says:

"This instrument contains an enumeration of the powers expressly granted by the people to their government. It has been said that these powers are to be construed strictly; but why ought they to be so construed? Is there one sentence in the Constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means for carrying all others into execution, Congress is authorized, "to make all laws which shall be necessary and proper" for the purpose. But this limitation on the means which may be used, is not extended to the powers which are conferred; nor, is there one sentence in the Constitution which has been pointed out by the parties at bar, or which we have been able to discern, that prescribe this rule. We do not, therefore, think ourselves justified in adopting it."

Our Constitution, Section 36 of Article 5, goes even further and says:

"The authority of the legislature shall extend to all rightful subjects of legislation, and any specific grant of authority in this constitution upon any subject whatsoever, shall not work a restriction, limitation or exclusion of such authority upon the same or any other subject or subjects whatever."

And again:

Section 45, of Article 5, of the Constitution of Oklahoma, is an analogous provision to that mentioned by Mr. Marshall in the case above. It reads:

"The legislature shall pass such laws as are necessary for carrying into effect the provisions of this Constitution."

Therefore, everything that Mr. Marshall says as to the necessity of taking broadly the provision discussed by him is applicable here. Continuing he says:

"What do the gentlemen mean by a strict construction? If they contend only against that enlarged construction, which would exetnd words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the Constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument—for that narrow construction, which would cripple the government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent—then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the Constitution is to be expounded."

We only suggest that this is precisely and truly a statement of the position of Plaintiff in Error in this case. It says that the method adopted by the legislature for the protection of the depositors and stockholders shall not be adopted but that it shall be allowed to continue in the pursuit of its happiness without consideration of that protection which the legislature deems necessary for the depositors. It desires that the contribution to the safety fund be not considered a thing requisite or proper for the protection

of the depositors and individual stockholders.

They are contending for that narrow construction which, "in support of some theory not to be found in the Constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are inconsistent with the general views and objects o fthe instrument—for that narrow construction, which would cripple the government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent."

In the same way they are asking for a narrow, crippling construction of Article 14 of the Constitution, "nor shall any State deprive any person of property without due process of law," and allege that to compel a banker to go into a mutual insurance of his deposits, is taking his property without due process of law, and is not a necessary and proper act for the protection of himself, his depositors and his stockholders; and they are contending for that narrow construction of Section 10 of Article 1, of the Constitution, "no State shall pass any law impairing the obligation of contracts," to the effect that they who were incorporated on the 23rd day of May, 1902, were issued a certificate to do business on the 7th day of July, 1902, under a law, that of 1899—the last proviso of Section 1 of Chapter 4, of the Session Laws of 1899—which provides:

"That all banking institutions now organized as corporations, doing business in this Territory, are hereby permitted to continue said business as at present incorporated, but in all other respects their business and the manner of

conducting the same and the operation of said bank, shall be carried on subject to the provisions of this act and in accordance therewith."

This contention is that it was authorized to do business under the provisions of the laws of 1899, and that, therefore, no provision of law can be forced upon it which compels it to do business other than as provided in the laws of 1899. That its charter was issued to it under that law; that the same is a contract with it; that none of its provisions can be modified whether for the protection of the public or not, which shall put any additional burden upon it or change any of the responsibilities, or duties, or powers with which it was then blessed or burdened. This narrow construction entirely fails to consider the fact that in 1899 the law was, "That every grant of corporate power is subject to alteration, suspension or repeal in the discretion of the legislature."

*Wilson's Annotated Statutes,* Section 932.

*Sioux City Street Ry. Co. vs. Sioux City,* 138 U. S., 98 Infra.

The Plaintiff in Error contends for a narrow construction toward the State of the privileges or immunities of citizens of the United States, and a narrow construction of the police power of the State. He contends that his private property is being taken for private use without his consent.

This narrow view fails to see that it is public property deposited for public use, there being no taking.

*In re Attorney General vs. N. American Life In-*

*surance Co.*, 82 N. Y., 172.

Again, a contention is raised upon Article 5, "that private property shall not be taken for public use without compensation." The plaintiff's narrow view overlooked the fact that the property is not taken; that there is just compensation; that there is full compensation; that it is only the use of the private property put where the public must use it, that is, control and regulate it.

*Munn vs. Illinois*, 94 U. S., 113.

Finally, on the eighteenth ground of the original petition, it is stated that the law is in conflict with the Fourteenth amendment of the Constitution of the United States and denies the Plaintiff in Error equal protection of the laws, overlooking the fact that a law which treats all bankers equally cannot deny any of them equal protection of the laws in so far as it deals with banking.

See *State vs. Richcreek*, 5 L. R. A., (N. S.), 875.

Further continuing in *Gibbons vs. Ogden*, Chief Justice Marshall said:

"The words are 'Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes.' The subject to be regulated is commerce, and our Constitution being, as was aptly said at the bar, one of enumeration and not of definition, to ascertain the extent of the power it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it com-

prehends navigation. This would restrict a general term, applicable to many objects, to one of its significations."

So here the framers of the Constitution and the people in adopting it, provided that the legislature should, by general laws, adopt a law creating a banking department with power and authority to regulate state banks. The grant was like that to Congress to regulate commerce, and for the same reason that interstate commerce must not be restricted to one of its significations, likewise, so banking.

The Plaintiff in Error seeks to confine the power of the State in its right to regulate the banking business to a right to regulate only the issuance of circulation, the making of loans, and the receiving of deposits.

We have already shown by the cases of *Kiggins vs. Munday*, 52 Pac., 855; *Patterson vs. Marine National Bank*, 130 Pa., 419, and other cases cited, that the payment of deposits is as much a public matter as are the other functions of banking. How then, if the legislature was authorized to regulate payments, could they exercise their discretion in this regard?

Further, in the Gibbons case, Chief Justice Marshall said:

"We are now arrived at the inquiry—what is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions

which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. *The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that for example of declaring war, the sole restraints on which they have relied, to secure them from its abuse.* They are the restraints on which the people must often rely solely, in all representative governments."

What, then, is the power? It is to regulate and control all State banks. That means therefore to regulate the custody and loan of money, the exchange and transmission of the same by means of bills and drafts, and the issuance of the bank's own promissory notes, payable to bearer as currency, or for the exercise of one or more of these functions, because, these are the things that a bank is, and the exercise of these functions constitute banking. In what direction must this control and regulation go in order that provision may be made for the protection of the depositors and individual stockholders? As was stated by Mr. Marshall in the Gibbons case, the wisdom and discretion of Congress are the only restraints—the wisdom and discretion of the legislature are the only restraints upon its power. "They are the restraints upon which the people must often rely solely in all representative governments."

That a like institution has been regulated or controlled in a similar way in the custody or loan of money, the exchange or transmission of the same by means of bills and drafts or in the issuance of its own promissory notes, payable

to bearer, or in one or more of these functions, shows a sufficient precedent upon which to base the validity of this law.

## 12. LAW TO BE HELD UNLESS PLAINLY UNCONSTITUTIONAL.

But, first, there should be considered what are the rules upon which a court declares an act of a legislature unconstitutional. I will cite here a collection of cases that appear in Mr. Moody's opinion in the Employer's Liability case:

"When the power to declare an act of Congress void was still undecided, Mr. Justice Chase said in *Hylton vs. United States*, 3 Dall., 171, 1 L. Ed., 556, p. 175: "If the court have such power, I am free to declare that I will never exercise it, but in a very clear case." Mr. Justice Strong said in *Legal Tender Cases*, 12 Wall., 457, 20 L. Ed., 287, p. 531: "It is incumbnet, therefore, upon those who affirm the unconstitutionality of an act of Congress, to show clearly that it is in violation of the provisions of the Constitution. It is not sufficient for them that they succeed in raising a doubt." In *Trade-Mark Cases*, 100 U. S., 82, 25 L. Ed., 550, Mr. Justice Miller said, p. 96: "When this court is called on, in the course of the administration of the law, to consider whether an act of Congress, or any other department of the government, is within the constitutional authority of that department, a due respect for a co-ordinate branch of the government requires that we shall decide that it has transcended its powers only when that is so plain that we cannot avoid the duty." In *Nicol vs. Ames*, 173 U. S. 500; L. Ed., 786, 19 Sup. Ct. Rep., 522, Mr. Justice Peckham said, p. 514: "It is always an exceedingly grave and delicate duty to decide upon the constitutionality of an act said, p. 492: "In examining the statute in order to determine its constitutionality, we must be guided by the well settled

rule that every intendment is in favor of its validity. It must be presumed to be constitutional unless its repugnancy to the Constitution clearly appears." Mr. Chief Justice Waite in *Sinking Fund Cases*, 99 U. S., 700, 25 L. Ed., 496, said, p 718: "It is our duty, when required in the regular course of judicial proceedings, to declare an act of Congress void if not within the legislative power of the United States, but this delcaration should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without charge. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

These citations might be multiplied. The result is, however, that only when a law is plainly unconstitutional will it be held to be so.

## 13. IS LAW UNREASONABLE.

Now what are the facts of common notoriety that should be considered bearing upon this case. Counsel for Plaintiff in Error in their brief at page 10, says, that they complain particularly of this law because "the assessment is compulsory, not voluntary; it operates upon all banks, both old and new; the fund raised is not applied to any governmental purpose, but is donated to private citizens who happen to be depositors in an insolvent bank.

### (A) FOWLER BILL.

In this connection first we wish to call the court's attention to the fact that the Fowler Bill, now pending before the last Congress, was of the same character. Section 12,

thereof, provides:

"That any National bank desiring to take out for issue and circulation an amount of 'National bank notes' in excess of its paid-up capital may do so, provided the board of managers of the bank-note redemption agency to which it belongs first gives its approval thereto."

Section 13:

"That the 'National bank notes' referred to in the two preceding sections shall be printed," etc.

Section 14:

"That thereafter every National bank shall have upon deposit upon the tenth days of January and July of each year, with the Treasurer of the United States, an amount of gold coin or other lawful money, equal to five per centum of its average deposits during the preceding calendar six months and five per centum of its 'National bank notes' taken out for issue and circulation."

And finally, after other provisions in regard to the bank notes, Section 17 provides:

"That the five per centum of all deposits so deposited with the United States Treasurer, the five per centum of all note issues so deposited with the United States Treasurer, and the two per centum paid to the Treasurer of the United States upon the 'National bank notes' in circulation shall constitute a common or general guaranty fund for the following uses and purposes, namely: To guarantee the payment of all individual deposits and all government deposits without discrimination or preference."

And Section 23 provides:

"That whenever any bank failure occurs after the first

day of January, nineteen hundred and nine, one-fourth of the loss resulting therefrom shall be borne by the banks of the bank note redemption district to which the bank failing belongs, pro rata or according to their respective deposits and note issues, the same being deducted from the interest due such banks upon their deposits in the guaranty fund, and the balance, or three-fourths of the loss, shall be borne by the general or common guaranty fund."

So that in principle the same kind of bill lately was pending in Congress that is challenged here, and we wish to call the court to note the fact that its constitutionality has certainly never been loudly questioned.

(B) PROBABLE LIMIT OF ASSESSMENTS.

In the first place is the assessment of one per cent in the Oklahoma law provided so inadequate that we must expect additional assessments from time to time, so as to take away from stockholders their property? We wish to quote from a speech of Hon. Chas. N. Fowler, of New Jersey, Chairman of the House Committee, delivered in the House, January 27, 1908; he said:

"Mr. Chairman, since provision has been made to guarantee all deposits and note issues, it becomes interesting to know what the losses have been during the last forty-four years, or since the establishment of the National banking system.

"There has been a total loss to the depositors in those forty-four years of only $33,183,290, or an annual loss of $71,704. The tax upon the average of deposits payable on demand to pay all the losses would only have been thirty-seven one-thousandths of one per cent.

"Since the net amount left in the Treasury from the income would be about nineteen millions for the first year, it would last about twenty-five years."

## (C) COMPULSORY CO-OPERATION REASONABLE

He also discussed the question of the insurance of the bank deposits, that is a safety fund, and uses this language:

"The insurance of deposits is a matter that has been discussed somewhat throughout the country, and I want to give the subject a little time in order that it may be thoroughly understood. Ten years ago I introduced a bill incorporating this principle, but making it optional with the banks to insure their depositors.

"On Wednesday, March 31, 1897, I used this language, referring to this subject: 'The principles that control in the vast operations of both life and fire insurance are identical with those upon which this provision rests. But my mature thought impels me to the conclusion that in neither is there so much need of averaging risk and escaping the consequences of misfortune as in the proposed remedy for the crash and widespread ruin that almost invariably follow bank failures today.'

"Mr. Chairman, life insurance is nothing but co-operation, to which each one contributes something. In life insurance a man must die to win. If he lives out his allotted time, he pays in full for his insurance. If a man dies who has insured his life, his family only are affected, and, materially speaking, are provided for to the extent of the insurance.

"You insure your house. Suppose there are ten residences in the block; yours may be a stone house, the next a frame house, the next a brick house, and the remainder all be frame houses. On the other half of the block there may

be a wood-working establishment, which greatly endangers all of the residences. If you live in the stone house, you find that your insurance rate is exceedingly high, and upon inquiry ascertain that it is so because of the frame house next to your own, and especially because of the wood-working establishment on the other half of the block. Yet you readily pay your insurance because of the danger of the neighborhood. This is the application of the law of co-operation so long established and so beneficent in its results that no one now stops to question the wisdom of it.

"Mr. Chairman, if there is one reason why this man should insure his life and that man his home, I assert that there are a thousand reasons why the bank deposits of this country should be guaranteed.

"I assert that all deposits in our banks are involuntary. Now, why are they involuntary? Because no one has the privilege of putting his money where it will earn a fair rate of interest—say 5 per cent—absolutely free from risk and at the same time to be able to recall it if he should desire to use it. Therefore he must choose some bank, and the very fact that it requires a choice between banks implies a risk which he must take.

"To illustrate the force of this statement you may take a city that has ten banks. The man who is in business deposits his money in one of these banks because he must have the convenience of a bank to carry on his trade. While, as a matter of fact, he has ten banks to choose from, in the last analysis, he must take one of them, even though he has little confidence in any of them. Therefore, he is of necessity an involuntary depositor.

"Reduce the number to three banks, and he must make a selection of one of the three, although he may have misgivings about all of them. Reduce the number to two, and he is driven to the choice of only one. But there are

many places in which he is compelled to use the only bank in the village where he resides. Therefore I assert that there is no question as to the fact that every bank deposit is involuntarily made, at least wherever it involves a choice, and especially where there is no choice.

"Mr. Chairman, think of it. There is not one person in ten thousand in this country today able to have a bank account who can understand a bank statement. And of those who can understand a bank statement and explain its various items not one in ten thousand, again, has any idea whatever about the true inwardness of the bank at which he is doing his business. How can he know? He cannot examine the loans and discounts of the bank. If he has any information at all, it must be such as he obtains from a statement of some member of the board in whom he has confidence. In the last analysis it is absolutely a matter of faith, and blind faith at that. The depositor is always wagering or betting the total amount of his deposit, whatever it is, that the bank is safe.

The deposit, therefore, must necessarily be an involuntary one, since a thorough knowledge of the assets is essential to an intelligent exercise of choice, which is absolutely impossible in every case except that of an officer of the bank.

Widows and orphans are constantly putting their money into the banks of the country. Why do they put it in a particular bank? Simply because some friend tells them that he does his business there. Can you say that they ought to exercise their judgment? What would their judgment be worth? It is not a question of discretion; it is simply a question of confidence, and that, too, in the word of some one director who may in fact know absolutely nothing about

the real condition of the bank, but, in turn, has perfect confidence in the president or cashier who is managing the concern.

"When a bank fails it is not as though a man's life had passed out or his home burned down. When a bank fails widows and orphans lose all they have in the world—a competency is wiped out and beggary follows.

"The State and the taxpayers are interested in preventing such misfortunes. A merchant may be keeping his account at a bank, relying absolutely on the institution to protect his interests, and if, by chance, he is an employer of a hundred men, 500 women and children may be dependent upon his employes.

"Again, a manufacturer who is employing a thousand men, with 5,000 women and children depending upon them, keeps his acocunts at a bank. If the bank fails and the loss to the manufacturer is so great as to destroy his business, 5,000 women and children are without support—the children may be driven from the public schools through the need of proper clothing.

"This is not all. The ramifications of credit are so extended and intricate that the business of the whole country is affected from one end to the other by bank failures, and no man can estimate the consequences, direct and indirect, growing out of them.

"I assert again, after the most mature deliberation, that if there is one reason for insuring life or home, there are more than a thousand good reasons, nay more than 10,000 good reasons why the depositors of the banking institutions of the United States should be insured."

It is urged against this law that this amounts to a legislative command, "We take yours to give to the thrift-

less." In that connection Mr. Fowler's speech also has matter that should be quoted here:

"Mr. Chairman, we are occasionally met with the statement that the guarantee of deposits would lead to unsound banking. Can anyone think of a man the day he gets his life insured purposely running under a street car to have his legs cut off? Can you imagine a man who, because he has insured his house, allows it to go into disrepair? Can you think of a banker, because he had insured his deposits, going into the directors' room and saying, 'Gentlemen, we have insured our deposits today. Now let us proceed to make some rotten loans.'

"Is it possible that it will not occur to these directors that their losses must come out of their profits, out of their reserves, out of their capital, out of their reputations? Will they not realize that they can get nothing out of the guarantee until the last dollar of profits, surplus and capital is wiped out, and the stockholders have been assessed in double the amount of their stock? Until their reputations have been injured, if not gone, and some of them possibly have started on the road to State prison?

"Mr. Chairman, can anybody think that any board of directors of a bank would be less solicitous, anxious, honest, and wise, after they had guaranteed the deposits than they were before?

Mr. Chairman, only the other day I saw in a bankers' bulletin an objection to the proposed measure; and knowing the writer to be a very intelligent man upon this subject, and he happened to be in the city on that very day, stopping at the New Willard, I proceeded to investigate the ground of his objection. Before finishing my conversation with him, having told him that his objection was not in accord-

ance with his known view, he finally admitted that the reason he could not support the bill was that his partner owned 2,000 shares of the stock of a certain trust company, and therefore, of course, he could not support the feature referred to. I knew that as well as he did after he had told me that his partner owned that much stock in a trust company, which probably wanted to carry 5 per cent instead of 20 per cent of reserves, and so to that extent imperil the banking situation generally.

"Mr. Chairman, the oldest bank president in some town, or possibly the president of the largest bank in some town, may say that he will not have the advantage in the future to which he believes himself entitled if deposits are insured; therefore there will be two classes who will oppose this principle. But banks, like other business institutions, will gain not by mere age and respectability, or by mere bulk of capital, but rather by ability to meet the requirements of their customers. Square dealing and capacity will tell for just as much after deposits are guaranteed as before.

"Mr. Chairman, is it not too high a price to lay upon the altar of some man's ambition all the business interests of this country and still continue the habit of panics, the destruction of credit, and waste of business? On the one side there are personal ambition, vanity, the supposed advantage of a few hundred men; on the other side millions of depositors with $16,000,000,000 of deposits to their credit in our banks, and the families of 20,000,000 of American toilers. Which side shall we choose? Where does the duty of Congress lie?"

In addition we desire to cite to the court some statements made before the committee of the House by Mr. Gage, former Secretary of the Treasury. After discussing the

existence of the former State banks, and the creation of the tax on them that caused the formation of the present banking system, he says:

"Now we have got the system as it is. Is it an effective system? Does it meet the needs of the country? Is it responsive to practical needs, and is it in accordance with the true scientific principles which ought to govern banking, and banking functions? They say everything is relative, and a comparison is the best way to show a fact, therefore I will venture to refer to the historical operations of a great bank in another country—the Bank of France—and ask you to look at his history and our own.

The Bank of France was established about the year 1803, I believe. It has the power substantially unlimited of note issue. Its credit notes in circulation have always been four or five or six or eight times its liabilities on its books. Its notes always circulate as money in the community. It continued undisturbed through the revolution of 1830 of Louis Napoleon, which disturbed the political condition of France to its center; it went on undisturbed in its operations and performed its functions, viz., to give its obligations in exchange for the obligations of those engaged in commercial and industrial pursuits, uninterrupted by the coup d'etat by which Napoleon III. made himself emperor, it came into the period of 1870 and 1871 when it saw its country devastated—nearly ruined. France was at the close of an exhaustive and futile war, its enemy was in possession of its capital, the country was under duress to pay a thousand million of dollars of war indemnity. It witnessed the

rise of the 'commune" with its regime of bloodshed, murder —of course all industries suffered—commerce was afflicted, and misery fell upon many people, especially in the besieged cities, but the bank continued its functions uninterrupted, without panic. It did suspend specie payments on its notes, out of prudent considerations, to control or to a degree put a limit upon the foreign export of gold, but at no time during this period of which I have been speaking did gold in France or on the Bourse at Paris, command a premium so high, measured in the notes of the Bank of France, as ordinary paper currency demanded in this country at the close of the most prosperous years the country ever knew.

These things are painful contrasts, and they need to be inquired into. Is the National system of currency and banking as now operating an effective system? It is not inviting to the public at large, for not more than half of the banking institutions and those who desire to engage in that business have embraced the provisions of the National banking act. We have 6,500 National banks organized over the country. They are each independent institutions, with no natural power of attraction toward each other by any law of self interest. On the contrary, as quick as a crisis comes, they become charged with the influence of a mutual repulsion, and each one by the instinct of self-preservation, or a narrow self-interest, begins to pull out of the community for elements of strength for itself. They refuse, as is demonstrated completely without any illustration—they suddenly

refuse to perform the functions of a bank which is to give credit in exchange for the credit of the community. They will no longer extend their credit. On the contrary, they insist upon the liquidation of credits due to them from the public, and the ruinous loss to the industrial classes—those who produce from the soil, those who work in the factories and those who are employed in common labor—can not be measured by any rule that I know of. We only know it is enormous and that the losses and adverse consequences which are so plain will for some time be continued.

"And again:

"If what I have so far stated has been a fair and true explanation as to the situation, what are you going to do about it? Let it drift? We have drifted over the rocks several times. We have drifted over them in 1873 and struck the rocks pretty hard. We drifted over them in 1890 and got a slight shock. In 1893, from entirely other causes, our financial ship bumped very badly. In 1907 we were on the deep waters of prosperity, where everything ought to have floated serenely, but we bumped hard. We stove open the bottom of the ship. We met with first class disaster. Are we going to keep on drifting or are we going to do something? Shall what we do be comprehensive or shall it be a mere makeshift? Shall the artificialities that have gone on for forty years be replaced by some other artificiality or shall we consider and see if we can not in some way establish foundations harmonious and consistent with the true laws that govern the whole subject?

"There are two measures that are proposed to Congress now. There may be others that I have not heard of. The one is the Senate bill introduced by Mr. Aldrich; the other is the House bill, which I hold in my hand, introduced by

the chairman and referred to you. Both bills, I think, are now before the committee, are they not?

The Chairman: No; the Senate bill has not come over to us.

Mr. Gage: The Aldrich bill, I think it will be clear enough from what I have said, I have no sympathy with at all. I do not think it is curative. I do not think it is curative of our evils. At best it is a patch or a panacea, if it even be a panacea, which once in ten years may be availed of when the country is in a condition of intense panic, and when many of the evils of the panic are developing and existing, and it may not be effective then. In the meantime, if adopted, it probably puts us to sleep. It is a gentle narcotic that woos the community into a false repose. I think, from which we will suffer many a nightmare, from which we will awaken at last in trouble and real agony.

"Now in contradistinction to that measure, there is this bill, which as I said a little while ago, reaches to the foundation of things and it eliminates two of the artificialities which I referred to as blocking the road to reform.

"These two statements are simply typical of the well understood fact that the present condition of banking business is unsatisfactory to everyone except some few bankers. There are some bankers, as pointed out by Mr. Fowler, who have a particular monopoly of the situation, who want it to continue as it is; but the whole country is in a revolt against their domination.

"As against the statement of the plaintiff that this method is unsound banking we cite the statement of Mr. Gage:

"'The stumbling block in the bill to most everybody, at first blush, is the guaranty of deposits. It stumbled me. I fell right down over that. I said, never, never; no, that won't do. You are not going to make a black man as good as a white man by just washing him. But I reflected on this. I studied this bill, and I am persuaded that it is just, equitable, wise and right that the creditors of the banks which come under the provisions of this bill will have their deposits guaranteed to them as will be the bank's circulating notes held by the general public. The nature of the obligation from the bank is exactly the same in principle whether evidenced by a pass book or by the bank's notes in the form of circulating money; there is no difference in principle. It may be argued that the man depositing had the right of selection, and he acted upon his own volition, but when he took the note he was under coercion. There is a certain plausibility in the argument, but where there is only one or two banks, or only three banks, there is not much right of choice when a man is under coercion of a business necessity.

"And again:

"'The Chairman: There is one more question that I would like to ask, Mr. Gage. Do you think that this guaranteeing of deposits would lead to unsound banking?

"Mr. Gage: No, sir; I think the fact that under your bill there would be a penalty for neglect of inspection and that there would be the machinery for inspection, would lead to sound banking. The only restraint upon the bank officer really is the fear of loss, not to his depositors, but to his stockholders. That fear and restraint would be as operative under your bill as it is now, and the influence of the inspections and the restrictions that would be formulated by these assoicates who have to bear part of the risk that that man takes if he goes wrong is a pretty good insurance that he will go right, and if he goes right, he will go in conformity with the principles of good banking instead of

going loose like a wild horse on the prairie..'

"So much for theory.

"There has existed in the past in the United States the very system in effect sought to be established in this act. It was in force in Vermont and we cannot find that its constitutionality was ever questioned there. It appears in *Elwood vs. State*, 23 Vt., 701, and *Receiver vs. State*, 39 Vt., 92, as though its constitutionality was not questioned. A similar law was in force in the State of New York and appears in *People vs. Walker*, 72 N. Y., 502, and *Cases of Reciprocity Bk.*, 22 N. Y., 9, *Matter of Lee Bank*, 21 N. Y., 9.

"Nor was the validity of the law questioned from anything that appears in the cases.

The cases cited above do not uphold the constitutionality of the law but simply take it for granted. The reason for this is probably to be found in the fact that in the day when these laws were passed State banks customarily issued circulating notes and a very unusual law to be found was one requiring a safety fund to be established to protect such circulating notes, and logically it was understood that if laws requiring a safety fund to stand back of the circulating notes should stand, there was no reason to question the constituitonality of a law requiring a safety fund to stand back of the deposits. If the public was interested in the indebtedness of the bank on its notes, it was equally interested in its indebtedness on its deposits. For instance, a familiar example is, every National bank is required to deposit with the United States government to secure its circulating notes. The amount of bonds required is as large as the notes, and is so large that one loses sight of the fact that the bonds were

simply deposited there as security for the notes and are and constitute a safety fund. No one has thought of contesting the validity of that law. It is taken for granted. It is the same principle as this now in controversy.

In the year 1829 the State of New York passed a safety fund act. By that act the banks were required to pay into a safety fund to be held by the comptroller and treasurer, a tax on the capital stock at the rate of one-half per cent per annum until the amount paid in was equal to the amount of three per cent of their capital stock. They were allowed to issue notes to double the amount of their capital, while their loans could not exceed two and one-half times their capital. From 1829 to 1841, notwithstanding the panic of 1837, no bank which had been organized under this law failed.

"Page 130 of Finances and Currency bills, House report 5629 of the Forty-ninth Congress.

"Likewise in Ohio, on the 24th of February, 1845, a Banking Act was passed, under which the Ohio State Bank was organized with branches. Every branch was required to deposit ten per cent of the amount of its circulation to create a safety fund to redeem the note of any bank which might fail. In 1846 there were 17 branches; in 1848, 25 branches; in 1849, 38 branches; in 1850, 39 branches. This bank only went out of business upon the passage of the tax on circulation, which made such banking prohibitive.

The State of Iowa in 1857 established a safety fund circulation of its banks. The State bank was incorporated with branches and the deposits were equal to 12 1-2 per

cent of the note issue. This bank was successful and passed out only for the same cause stated before.

In Canada there is a banking system where the law provides for a guarantee of 5 per cent. It has existed for years with satisfaction to the people.

In none of these are we able to find that the constitutionality of the act was questioned, and the fact that such power was exercised openly and for a long number of years without being questioned, raises the presumption that both the safety fund for the protection of the circulation in the states named, and the safety fund for the protection of depositors as it existed in New York and Vermont must raise a strong presumption of the fact that when the framers of the constitution wrote Section 315, and the people adopted it, the meaning to them was that a safety fund for one or both purposes, being a known remedy, was included.

Zane on Banks and Banking, Sections 7 to 15, inclusive, discusses the question of whether banking in all of its features can be made a franchise. And arrives at the conclusion that it can for the reason that it being beyond dispute that issuing of circulation can be made a franchise, that it should follow that the receiving of deposits likewise could be made a franchise. In Section 8 he says:

"All the courts seem to have recognized that the power to issue notes to circulate as money could be made a franchise. No one ever seems to have questioned the right of the legislature to make the power to issue currency a franchise grantable by the state. It is put on the ground that

the government has the power to protect its subjects from a worthless currency. If the legislature can take away one branch of banking from private citizens for the public good, it would seem to follow as a matter of strict logical deduction that all branches of the business could be made franchises."

And further on in Section 11 he says:

"The issuance of a note payable on demand in the place of a sum of money deposited or borrowed does not differ in the least from a book account payable on demand for a sum deposited. In fact the issuing of the note is the older banking transaction. It is true, that the note can circulate as money, and the book account cannot. But certificates of deposit and savings books can so circulate in theory, although the form of the latter is too cumbrous for practical use, and the courts deny to them negotiability. Yet the currency does not become demoralized as long as the banker's credit is perfect. If a bank of issue fails, the notes become, of course, practically worthless, unless secured. The same result follows upon a bank failure as to the deposit accounts. Just as much will be paid on the notes as on the deposits. Rather fewer people are affected by the depreciation in the value of the notes for the deposit account will generally be much larger than the note issue. The direct and indirect effects of a bank failure on its depositors would perhaps be as large as the same effects upon the note holders.

But every one must concede as to banks of deposit that people know little of a private banker's responsibility, and are prone to accept the fact that a man is a banker as a guaranty of his perfect financial responsibility. That may be their own fault, but it is none the less a fact. Much could be said, however, against the possibility of any man finding out anything from published bank statements. The loans and discounts may be good or bad; the fact can only be ascertained with much trouble. It is found that bank

supervision and examinations do not insure good banking, and that the ultimate guaranty against loss is the double responsibility of stockholders."

## 14. IN THE LEGISLATURE NOT THE COURT IS DISCRETION AS TO METHOD.

Upon the same reasoning we suggest that if the public has a right to regulate a bank at all it can regulate it in any manner that the legislature chooses, that is not directly denied by the constitution. As to the effect of the limitations of the constitution we have already spoken. Our law and the law under which this bank was incorporated provided for a bank inspection by a bank examiner, and provided that the cost of this inspection should be paid by the banks. Such a law has been upheld in:

*Blacker vs. Hood,* 24 L. R. A., 854.

In that case the Kansas court held, and in doing so likened the banking business to the insurance business:

Syllabus: "We have frequent instances of the exercise of the police power to prevent imposition and extortion, and of the regulation of employments, and also of business, of a quasi-public nature. By virtue of the police power, regulations have been imposed on the practice of law, medicine and dentistry, as well as upon bankers, millers, and wharfingers, and it has been accepted as a proper exercise of the police power to regulate pawnbrokers, junk shops and loan offices. Inspection laws, and those regulating the weighing of commodities offered for sale are generally regarded as suitable and valid regulations of police. 18 Am. & Eng. Encyclop. Law, 747-759. The right to regulate and control the business of insurance, as well as that conducted

by mills and warehouses is no longer doubted. Enactments controlling the loaning of money, and regulating the rate of interest upon the same, have been sanctioned from the earliest times, and the nature of the business done by banks in dealing in money, receiving deposits for safe keeping, discounting paper, and loaning money, is such, and is so affected with a public interest, as to justify reasonable regulation for the protection of the people. The confidential trust relations which exist between the bank and its patrons, and the difficulty that depositors and those dealing with the bank necessarily encounter in detecting irregular practices and in ascertaining the real financial conditions of banks, are sufficient to justify inspection and control. Those engaged in the business invite all the community to deposit their funds with them, which, when obtained, is largely used for their profits. The numerous instances where the earnings and the funds of people so deposited are dissipated and lost shows the necessity for measures to protect the people from imposition, extortion, and fraud. For this reason, most of the states have enacted laws recognizing banking as a quasi-public business, and regulating the same to a greater or less extent. A well known author, in his treatise on banking uses the following language: At common law, the right of banking pertains equally to every member of the community. Its very exercise can be restricted only by legislative enactment, but that it legally can be thus restricted has never been questioned. 1 *Morse, Banks and Banking*, Section 13. The same subject was considered in the recent case of *State vs. Woodmansee*, 1 N. Dak., 246, 11 L. R. A., 420, where it was said that 'the business of banking, by reason of its very intimate relations to the fiscal affairs of the people and the revenues of the state, is and has ever been considered a proper subject of control, and strictly within the domain of the internal police power of every state. As a matter of fact, we have been unable to find an authority—and we have searched diligently—which has ever questioned the right of the legislature, in the exer-

cise of police power, to regulate, restrain, and govern the business of banking.'

See also *People vs. Utica Ins. Co.*, 15 Johns., 358, 8 Am. Dec., 243; *People vs. Bartow*, 6 Cow., 290; *Curtis vs. Leavitt*, 15 N .Y., 9; *State vs. Williams*, 8 Tex., 255; *Nance vs. Hemphill*, 1 Ala., 551; *People vs. Brewster*, 4 Wend., 498.

If we have now established the quasi-public nature of the banking business, and that the legislature can provide for its regulation and control, upon what authority can the court enter into a discussion of the expediency, wisdom or adequacy of the particular scheme of regulation or control that is adopted? Upon the ground of the authorities named in the beginning of this brief the court must determine the legislation good, as was said in *Munn vs. Illinois*, from the habit of the legislature to act in such matters. As was said in the case of *People vs. Budd*, 117 N. Y., 1, affirmed 143 U. S., 517, as to the analogous business of warehousing:

"But the material point is that the prohibition as well as the regulation of the interests was based upon public policy, and the present conceded right of regulation does not have its foundation in any grant or privilege conferred by the sovereignty. The attempts made to place the right of public regulation in this case upon the ground of special privilege conferred by the people on those affected, cannot, we think be supported. *The underlying principle* is *that business of certain kinds holds such a peculiar relation to public interest that there is superinduced upon it the right of public regulation. We rest the power of the legislature to control and regulate elevator charges, on the nature and extent of the business, the existence of a virtual monopoly, the benefit derived from the canal, creating the business and*

*making it possible, the interest to trade and commerce, the relation of the business to the prosperity and welfare of the State, and the practice of legislation in analogous cases. These circumstances collectively created a special case and justify legislative regulation."*

## 15. NO DEPRIVATION OF PROPERTY IN MODIFICATION OF LAW.

The fact that formerly it was not necessary for banks in this State to contribute to a safety fund, and that right to do business in that way is taken away, is nothing but a mere common law regulation of trade and commerce that was then used.

In *Munn vs. Illinois*, 94 U. S., 113, in speaking of the regulation of warehouses the Supreme Court of the United States said:

"But a mere common law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. This is only one of the forms of municipal law and is no more sacred than any other. *Rights of property which have been created by the common law, cannot be taken away without due process; but the law itself, as a rule of conduct may be changed at the will or even at the whim of the legislature unless prevented by constitutional limitations.* Indeed, the great office of statutes is to remedy defects in the common law as they are developed and to adapt it to changes in time and circumstances."

There is no attempt to take away from the plaintiff the property it had acquired, only the right to continue to do business as before.

The question of how far the regulation may go was discussed in *Goodsil vs. Woodmanse,* 11 L. R. A., 421, and in that case it was held that it could go as far as to prohibit private banking. That part of the discussion we shall quote:

"As a matter of fact, we have been unable to find an atuhority, and we have searched diligently, which has ever questioned the right of the legislature in the exercise of police power to regulate, restrain and govern the business of banking.

"The relator, however, complains that Section 27 does not merely regulate; it goes further, and prohibits individuals from banking in a private capacity. But the prohibition of private banking necessarily results from the inauguration of a banking system for the State in which the business is made an exclusive corporation franchise, *i. e.,* a business which can be carried on only by those who become incorporated and are willing to subject their business to the restraints and safeguards found in the Banking Law under which they acquire the right to carry on such business. It would avail little in our view of the matter, to provide salutary rules and wholesome safeguards for the business of banking when carried on by a corporation, if at the same time private persons, firms and corporations are permitted to carry on the business unhampered by such restrictions and safeguards. But, as a matter of precedent and authority, the legislative prerogative, in the exercise of its police power in promoting public safety, not only to regulate and restrict the business of banking, but also to grant the right to one class, and to prohibit to others, or even to forbid it altogether, has never been questioned in the courts, and the legislatures of other States have frequently exercised the right of supreme control over the business.

* * * * * * * * * * *

"It is clear from these citations that the matter of regu-

lating and prohibiting private banking, and all banking not expressly authorized by law, is strictly within the legislative discretion, under that branch of the police power relating to the public safety, and that the courts will not interfere and declare such legislation unconstitutional as an evasion of individual rights."

## 16. IS THERE DISCRIMINATION?

The same question was discussed in *Youngblood vs. Birmingham Trust Co.*, 2 L. R. A., 60, as follows:

"The business of banking is well understood and defined. A chief part of it, in most instances, consists in the lending of money, and this is almost always done by discounting evidences of debt. The opportunities and temptations of persons engaged in it to evade or violate the laws against usury are so much greater and more frequent than those of persons not so engaged as to raise up a necessity for the application of more stringent measures of repression than are necessary in respect of other businesses and persons engaged therein; and it is this consideration which differentiates the business of banking from all others in respect to usury, and furnishes a predicate for such legislation as is embodied in Section 4140 for the regulation of banking and bankers, which does not exist as to any other occupation, just as the inherent dangers involved in the operation of a railroad differentiates that from other occupations, and necessitates legislation which would be entirely unnecessary and innocuous in respect of the business of farming for instance. And upon this ground statutes of this character, when made to apply to all persons, whether individuals or corporations, regulating occupations have been upheld. Judge Cooley, in this connection, says: "The Legislature may also deem it desirable to prescribe peculiar rules for the several occupations, and to establish distinctions in the rights, obligations, duties and capacities of citizens. The business of

common carriers, for instance, or of bankers, may require special statutory regulations for the general benefit, and it may be a matter of public policy to give laborers in one business a specific lien for their wages, when it would be impracticable or impolitic to do the same for persons engaged in some other employments. If the law be otherwise unobjectionable, all that can be required in these cases is that they be general in their application to the class or locality to which they apply; and they are then public in character, and of their propriety and policy the legislature must judge." Cooley, Const. Lim. pp. 480, 481.

In the case of *State vs. Scougal,* 15 L. R. A., 477, the authority of the legislature to prohibit private banking was denied, but that was under a peculiar constitutional provision which reads:

"No law shall be passed granting to any citizen, class of citizens or corporations, privileges or immunities, which upon the same terms, shall not equally belong to all citizens or corporations."

Our provision is Bunn's Const., Section 124:

"The legislature shall pass no law granting to any association, corporation, or individual any exclusive rights, privileges or immunities within this State."

That is that every corporation or association shall have any right that any other corporation or association may have, and any individual any right that any other individual may have. Whereas, the South Dakota statute prohibited giving to a corporation what could not be given to an individual. We shall therefore not mention that case further.

## 17. CONSTITUTIONALITY OF OTHER METHODS ARGUES VALIDITY OF MUTUAL INSURANCE.

If it now has been sufficiently established that at least some of these matters regulated by the State are proper, upon what principle must the safety fund be forbidden:

The prohibition against the bank investing its funds in merchandise or the stock of other banks or its own stock, certainly is a taking of the bank's property, if the law compelling it to pay an assessment to a mutual reserve fund is such. The prohibition against the investment of the funds is in a sense a taking away from the bank a right to invest as prohibited. The duty to deposit only takes away from the bank the right to make some other disposition of the money assessed. If Section 13 of the Act of 1899 prohibiting the use of more than a certain amount of the bank's money and requiring the balance to be held as reserve is not a taking of its funds, then neither is the requirement of the safety fund a taking of its funds.

The provisions of Section 14 of the laws of 1899 prohibited the bank from loaning more than 20 per cent of its capital stock to any one person. This was a limitation upon its general common law right to dispose of its funds as it saw fit.

The provision for a bank examiner is in all sense of principle, precisely the same as the creation of a safety fund. The bank inspector is a watch against loss. The safety fund is an insurance against loss. If, for a building a watchman

could be required, so for that building insurance could be required. The bank commissioner and a bank safety fund assessment are simply different ways of accomplishing the same purpose. The legislature alone must determine which method shall be provided, and our legislature has provided that both shall be.

*The Annotator to State vs. Richcreek*, 5 L. R. A. (N. S.), 875, says:

"Although there is no doubt as to the general power of the State, in the exercise of its police power, to impose conditions and restraints upon the right to engage in the banking business, legislation on this subject, in order to be upheld, must, of course, be so drawn as to not violate particular constitutional provisions, such as those prohibiting the granting of special privileges.

"It is clear, of course, that the power of a State to grant or withhold from corporations the right to engage in banking business presents an entirely different question from its right to withhold such power from private individuals, since a corporation can engage in no business, even one which is of common right to individuals, unless the power to do so is expressly or impliedly granted by its charter or the laws under which it exists."

The case of *State vs. Richcreek*, 77 N. E., 1085 (Ind.), 5 L. R. A. (N. S.), 874, is particularly in point. The question there discussed was whether the limitations in the Indiana Banking laws, that the real estate, bank furniture and fixtures shall not constitute more than two thirds the value of the entire capital, whether that contravened the provisions of the Indiana constitution, that no man's prop-

erty shall be taken by law without just compensation, and Section 23, of Article 1 of the Constitution, that the assembly shall not grant any special privileges. And the court there decided that the law was not faulty in either respect, nor did it contravene the Fourteenth amendment of the Constitution of the United States. It said:

"The circumstances that for a time it may inflict hardship, inconvenience, and possibly loss to certain individuals, does not amount to a constitutional objection so long as such burdens or losses are not needlessly and unreasonably imposed, but result as an incident of a general enactment fairly designed to subserve the public welfare."

And in discussing the Fourteenth amendment to the Constitution of the United States, the court said that:

"Neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."

Keeping in mind now the words of the great Chief Justice in the Gibbons case, that:

"If as has already been understood of the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on exercise of power as are found in the Constitution of the United States."

It follows that the power to regulate banking being

given to the legislature to use for the protection of the depositors and stockholders under Section 1, Article 14, of the Constitution of Oklahoma, the exercise of this power is plenary as to that object, and within the restrictions placed by the Constitution of the United States and of the State. And, in a word, it may be said that the limitation on the police power of a State is that it shall not confiscate the property of a citizen, that is, that it shall not act unreasonably in the taking. If there is a question as to the reasonableness or unreasonableness; if, as against any charge of unreasonable any defense of reasonable, can logically be interposed, then, in such case, the discretion of the legislature must reign supreme. As was said in the Gibbons case:

"The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that for example of declaring war, the sole restraints on which they have relied to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."

## 18. OKLAHOMA LAW REASONABLE AND EXPEDIENT.

We wish now to discuss the Oklahoma law, in view of the charges of unreasonableness brought against it, and see if as against each charge of unreasonableness a defense of reasonableness may logically be brought. But, first, because every statute must be read in the light of its constitutionality something should be said as to the general

spirit of the Constitution of the United States and the spirit of the times in which this State legislation was enacted.

## (A) CONSIDER CIRCUMSTANCES OF FEDERAL UNION.

Chief Justice Story in *Martin vs. Hunter*, 1 Wheaton, 346, said:

"The Constitution has proceeded upon a theory of its own, and given or withheld powers according to the judgment of the American people by whom it was adopted."

He did not mean, I take it, that the Constitution was created or written upon one conscious theory or theoretical abstraction, but only that if there were novelties therein, not to be found elsewhere, that this was no objection because the people had a right to choose any form of government they wished. That my view is not unsupported appears from the statement of Justice Catron in *Scott vs. Sandford*, 19 How., 526, that the Constitution was framed in reference to facts then existing and likely to arise; the instrument looked to no theories of government, and, as said by Justice Holmes, in *Davis vs. Mills*, 194 U. S., 457:

"Constitutions are intended to preserve practical and substantial rights, not to maintain theories."

But the Constitution must be considered from the point of view of the lay mind because it is not so much the meaning of the persons who wrote it as the understanding of the people who adopted it.

As Justice Story said, in *Martin vs. Hunter*, 1 Wheaton, 325:

"The Constitution of the United States was ordained and established, not by the States in their sovereign capacity, but emphatically, as the preamble to the Constitution declares, by 'the people of the United States.'"

And Mr. Cooley, in his work on Constitutional Limitations, 7th Edition, Chapter 4, Page 89, says:

"The object of construction, as applied to a written constitution is to *give effect to the intent of the people in adopting it.*"

And, as he says on page 101:

"For as the Constitution does not derive its force from the convention which framed it, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but, rather, that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the design to be conveyed."

The meaning of the Constitution, therefore, being properly found in that of the lay mind, I wish to quote from two recent expressions of presidents of prominent universities in the United States as to that meaning to the lay mind.

A lecture given by President Hadley, of Yale, at Berlin University, on the constitutional position of private property in America, appears, with slight modifications, in the New York Independent, of April 16, 1908. The points that he presents are these: That private property in the United States:

"Is constitutionally in a stronger position as against the government and the government authority than is the case of any country in Europe."

That:

"Property, in the modern sense, was a comparatively recent development in the public law of European communities."

While in this country it:

"Represents the basis on which the whole social order was established and built up."

That in this country:

"There being plenty of land for all—plenty of opportunity for the exercise of labor and the use of capital—the laws were so framed and interpreted to give the maximum stimulus to labor and the maximum rights to capital."

And, therefore, on the separation of this country from England:

"Respect for industrial property right was a fundamental principle in the law and public opinion of the land."

That the makers of the Constitution:

"Were not thinking of the legal position of private property, but it so happened that, in making mutual limitations upon the powers of the Federal and State government, they unwittingly incorporated into the Constitution itself certain very extraordinary immunities to the property holders as a body."

He then refers to the provision against taking private property without due process of law, and the inhibition against the passage of laws impairing the obligation of contracts.

The justice of these remarks appears when we remem-

ber that in England, as Chief Justice Coleridge said, property exists only by reason of the law which has created it, and the law which has created may destroy, whereas, in this country the Constitution itself creates with a sanctity equal to that of every portion of the government, including even this court.

To rightly appreciate the force of this compact it is not necessary to have in mind the historical facts surrounding the making of a National Constitution. At the time of the penning of the National instrument the civilized globe was being shaken to its center by a movement to put an end to the arbitrariness of government. The new spirit of democracy was just coming to the front on the continent, had caused the revolution in France, was working a revolution in England, less silent but no less profound, and the impotency of England to protect and its rapacity to seize taxes and power in this country, added to the general movement toward democracy and reformation, blew the spark of independence into a fire, caused the revolution, and wrote the Constitution under the conjoint influences of the precedents of England and the theories of France.

## (B) BUT TIME SHOWS NEED OF REGULATION.

To much arbitrariness in government had been the evil felt—to let the individual loose was the object sought. But the spirit of Benthamism, the spirit of *laissez-faire,* was then at its height. It may be said that the American Constitution is based upon the theory of *laissez-faire*—upon the

law of the beauty of naturalness. But, however fine nature is in the physical world, and however beautiful this theory appears in the works of Bentham, Americans, and not only Americans but also on the continent and in England, the operation of *laissez-faire* has not been all that was promised for it. For human organizations have a will of their own and do not go according to the law of nature. Liberty, fraternity, equality, was not realized in France, nor England, nor altogether in the United States. We have found, as a matter of fact, that when matters ran as they would, they ran wrong. Master and servant working together according to the theory of *laissez-faire* fell out and ran amuck—and the American public, though restrained by the courts, have grown wonderfully tired of the theory of contributory negligence and assumption of risks as applied in extreme cases. There is the feeling that the startling condition of the insurance companies shown in the recent investigations; that the over-weaning influence of the railroads on the coal companies and the lumber industries, and other industries receiving particular sustenance from the railroads; that the heartless rule of charging the traffic all it will bear; that the over-burdening of the public with the duty of supporting a reasonable return on the watered stock of public service companies, and what seemed the arbitrary failure of the Eastern banks to honor the proper drafts of their Western customers in the bank panic of 1907—all of these things seemed to be the children of *laissez-faire.* All of these evils seemed to come from too little control of

property, too much freedom to the individual rich man, too little shelter for the inert mass of wage-earning, day-laboring mankind. The president of the United States only voiced the public conscience when he spoke against these evils. The public is not in sympathy with that law which says that the factory hand with his five little children, his early-aged wife, his art of working at one calling only, which says of him that he freely has assumed the risks of his employment—the public knows that he is not a freely acting, independent man—they know that he must work as he does or starve. There is a clearly defined public impulse to go to the relief of those who suffer by such facts beyond their control. A public conscience which says that the public must protect the individual from the too great power of private property—particularly in the form of corporate might.

## (C) THE MORALS OF THE TIME.

As voicing this public conscience, I call attention to the recent speech of President Woodrow Wilson, of Princeton University, at the Bankers' Convention, in Denver. I am quoting from the Literary Digest of October 17th, on page 543. He said:

"For the first time in the history of America there is a general feeling that issue is now joined, or about to be joined, between the power of accumulated capital and the privileges and opportunities of the masses of the people. * * * The most striking fact about actual organization of modern society is that the most conspicuous, the most read-

ily welded, and the most formidable power is not the power of government, but the power of capital. * * *"

The contest is not so much between capital and labor as:

"Between capital in all its larger accumulations and all other less concentrated, more dispersed, smaller economic forces in the land."

There will be need of many cool heads and much excellent judgment, he predicts, to

"Curb this new power without throwing ourselves back into the gulf of governmental domination from which we were the first to find a practical way of escape. * * * Capital must give over its too great preoccupation with the business of making those who control it individually rich, and must study to serve the interest of the people as a whole. It must draw near to the people and serve them in some intimate way of which they shall be conscious. Voluntary co-operation must forestall the involuntary co-operation which legislatures will otherwise seek to bring about by the coercion of law."

This is then, I take it, an exact description of this Oklahoma legislation. Here on the one hand is the power of private property, as President Hadley says, assured in a stronger way against the government than in any other country, protected by extraordinary provisions in the Constitution of the United States. And, on the other hand, is a clearly defined realization that voluntary co-operation is not forestalling the situation, that legislatures are seeking by the coercion of law to force involuntary co-operation, and the only limit on the involuntary co-operation which legislatures must force, is they can not under the exer-

cise of pretended police power confiscate or unreasonably hinder the property of individuals. They may, however, do everything that is not against the policy of our institutions. The only limit is public policy—and in using these words I have in mind the definition of Judge Story, in 1 Story on Contracts, 649, where he says:

"That wherever any contract conflicts with the morals of the time and contravenes an established interest of society, it is void as being against public policy."

## 19. PUBLIC POLICY.

I take it that the legislature under the police power may force the involuntary co-operation of private property for the public benefit, only they must not conflict with the morals of the time in so doing, and must not contravene an established interest of society.

Let us then examine the Oklahoma law and see if its provisions are subject to condemnation within this definition.

In the first place, one objection raised to the Oklahoma banking law, its safety fund feature, is that it begins at the wrong end. It is said that the trouble is in the inelasticity of currency, and that the need is not of a safety fund but of a greater supply of money when it is needed, or that which passes current as money. But this argument is squarely met with the statement that as long as the policy of the people of the United States is to destroy by taxation the power of the issuance of circulation by State banks, that the only method to add to the currency being the power

to issue bank circulation, that that avenue of relief being closed entirely to the states, it is not a criticism of a State law that it does not provide for a more elastic currency; that the shortcoming is with the National legislature.

I have shown that the scheme adopted, while not in vogue for many years, is not novel. I have shown that the principle of the scheme outside of its mutual insurance feature, that the scheme of requiring a safety fund, is the very principle upon which the Federal law demanding a deposit of bonds before the issuance of circulation by the National banks, and the State and National laws demanding a reserve fund of cash are based. If it is within the proper police power of the Nation and the States to demand a safety fund as against the bank circulation, and to demand a reserve fund as against the deposits, the only principle not covered by a well known public policy is that that President Wilson denominates "involuntary co-operation," that is, the compulsory mutual insurance. For, if the United States government requires the National banks to deposit with it bonds as security for the redemption of the bank's circulation, no objection can be had if the same power for the States require a deposit to secure the payment of depositors. No reasonable difference can exist. The holder of circulation or a bank note is no better than the holder of a pass book.

## (A) IS THERE A DISTINCTION?

The distinction in this case is sought to be rested upon the fact that innocent purchasers may hold bank notes who

did not voluntarily choose the bank, whereas, the depositor is so of his own volition. Of course, that argument fails in this, that the so-called innocent purchaser could refuse to take the bank note, except that the government having made the bank note currency has adopted a means to secure its guaranty, and also, as Mr. Fowler, in his speech before Congress, and as Mr. Gage, in his speech before the Congressional committee, and as Zane, on Banking, Section 11, shows, the depositor can know nothing about the banks, and because he who acts in the dark may not be said to act voluntarily.

It is next claimed that this law is against public policy in that it is said it puts a premium on recklesness. In this criticism, however, the detractors of the law overlook the fact that Section 18 of the law of 1907 gives the bank commissioner authority to remove from office any officer of the bank found by him to be dishonset, reckless or incompetent, and that in the State of Oklahoma no reckless, dishonest or incompetent banker can go into the business and remain in it unless the bank commissioner is equally incompetent or dishonest.

And again, the argument that the safety fund puts a premium on recklessness overlooks the argument stated by Mr. Fowler and Mr. Gage—that the responsibility of the manager of the bank is not so much to the public as to the stockholders—that the salary, promotion, and the future happiness of the manager of the bank depends upon the

good will of the stockholders, and that if the assets of the bank have a lien placed on them to repay the safety fund all that it advances for the bank, therefore, the doing of anything which will make likely the securing of the depositors by the safety fund in no way secures the manager of the bank from the wrath of the stockholders because of the burden necessarily put on them.

The argument is also advanced that because of the safety fund coming forward to save the depositors, the criminal provisions of the law will not be enforced in that individuals will not lose money, and, therefore, there will be no human interest to push the prosecution of the defaulting bank manager. This also overlooks the condition of the stockholder, whose property will be taken from him by the reckless or dishonest bank manager or bank official, who, for the very reason that the depositors are protected by the safety fund where he is not will be the keener because of his isolation to prosecute the offending official.

The chief objection to the law, however, raised under the head that it is against public policy is the compulsory features thereof, that is, what Mr. Wilson calls the "involuntary co-operation," and its critics seek to stir up partisan feeling by claiming that it is the work of a particular man or set of men. This court will remember, however, that the principle of this law is nothing but what was termed the "Baltimore plan," widely talked of and encouraged by most of the bankers of the East in the years immediately follow-

ing the panic of 1893. After the levying of the ten per cent tax against State bank circulation no panic occurred until 1873. At the latter time the disuse of the safety fund being only about fifteen years old very natuarlly no attempt sufficiently great for me to learn of it was made to go back to the safety fund plan, and, very naturally, no attempt was made from the passing of the circulation tax law until the panic of '73, because only in time of panic is an examination made of financial methods. The best sign of health is not to know that one has a stomach, a heart, a set of lungs or a liver, and in time of business prosperity likewise no reckoning is taken of methods. But in 1873 a panacea was proposed to General Grant in the way of more greenbacks, which law he vetoed, and in 1893 the panacea proposed to Grover Cleveland was free silver, which he also rejected. But as early as 1897 we see an attempt to go back to the safety fund method. In a speech made by Mr. Fowler in Congress on Wednesday, March 31, 1897, he said:

"The principle that controlled in the vast operation of both life and fire insurance are identical with those upon which this provision rests. But my mature thought impels me to the conclusion that in neither is there so much need of averaging risk and escaping the consequences of misfortune as in the proposed remedy for the crash and widespread ruin that almost invariably follow bank failures today."

From it, it is plainly to be seen that in 1897 he was advocating the principles of the Baltimore plan. Very naturally, the subject passes out of view until 1907, because

of the prosperity attendant upon that period. And in 1907 the same principles, put into the Fowler bill are again brought forward, so that it cannot be said that the people of the United States have ever lost sight entirely, have ever recognized absolutely, that the compulsory insurance of bank deposits is against public policy, that is, against the morals of the time or the established interest of society. And who, remembering how the hum of business was stricken dumb by the closing of the banks last October, will deny that banking is a public business, that the public must resort to it, and, therefore, according to *Munn vs. Illinois*, to be controlled for the public protection. Concede the constitutionality of those acts that require a reserve fund, that is, a portion put by for a bad day, is it not conceded that can be compulsory mutual insurance—that is, a portion invested for the bad day? It is clear that this plan is the very thing that Mr. Woodrow Wilson spoke of in Denver. It is the involuntary co-operation forced by legislation which capital itself had failed to extend to the people in such an intimate way that they could be conscious of its benefits. We can see that this law is not a law compelling one man to pay another man's debts, but a law compelling co-operation in a venture of such great size that one man or set of men is too small to handle it adequately to the needs of the public, and that all must contribute their quota towards it. Where can there be legal objection to this? If I must pay taxes for the maintenance of schools whether or not I have children, or a fire-fighting force whether or not I have a build-

ing, or a police force whether or not I have anything that any one could burglarize, and thus through an infinite number of business charges, which, by reason of their size, must be placed upon the entire public or a certain class of the public, then there is no reason why the expense of the maintenance of a safety fund should not be put upon all the bankers. The plan carries many automatic securities for its working out. The truth of the matter is this—when the legislature puts a burden upon my rivals in business to watch my acts, they then have sharpened the keenest set of eyes to see all my faults. When the bank on one corner is responsible for the actions of the bank over across the way, then the public will have more protection than it has today. When a bank fails today, do not the bankers know of its condition first? This theory of putting one bank on guard against the others is not unsupported by proof. Those of us, and I am sure that the members of this court who have followed closely the development of the West—those of us who have gone through the homesteading of public lands know that where a government inspector has discovered fraud in the taking up of the land it is generally because the neighbors had observed the infractions and reported it to the inspector. The neighbors would not have observed this in most cases except that to the informant who proved the case went the preference right to file on the land. It became a matter of interest to him to know that his neighbor was obeying the law. And when it becomes

of interest to the banks to know that of their rivals, the law will be obeyed.

The welfare of the public demands that the poor do not lose their funds through the failure of banks. When a bank fails, the women and the children, the support and hope of the Republic, stay in want, or away from school for want of food, or of clothing to face the public. It is not the wealthy who have money in the banks. The banks are the store-houses of the poor. The wealthy invest, the poor deposit. These are not matters of guess. It is a matter of common conviction that the difficulty of detecting fraud in the management of the banks should not deter the government from taking some steps to protect the public. While individuals may lose in a bank failure and shortly thereafter not feel the loss, yet when a bank failure stalks into the hovel he wreaks a tragedy on the public which the public is determined to suppress. Whether the method adopted shall be that suggested by the Attorney General, Mr. Bonaparte—a taxation to the depositors on their deposits to preserve them, or a taxation to the depositees who make the profit out of the deposits, as the State of Oklahoma suggests, or to both of these, is a matter that only trial can elucidate, and a matter that must rest in the wisdom and discretion of the legislature, and is not one that is against public policy.

## 19. HOW FAR FOR PUBLIC POLICY MAY INVOLUNTARY CO-OPERATION BE FORCED?

How far has the public policy of the States gone in the direction of the compulsory co-operation produced by legislation? A strong chapter covering the whole ground is contained in Freund, on Police Power, Chapter 20, under Compulsory Benefits. Therein, in Section 444 (to depart from his order) compulsory co-operation for the building of division fences, or the prorating of expenses to adjoining owners, has been firmly established in legislation and the validity of it so often assumed as to be beyond question. Hence, the compulsory co-operation in regard to party walls is well recognized. A compulsory co-operation in draining and irrigation is sustained by the decisions of the courts of the States and of this court. Freund shows, in Section 428, that the protective tariff itself is an instance; that the teacher's pension fund in Ohio, though declared invalid because it was not general, and taken partly from salaries, the interest in which was already vested—yet the principle of this legislation was approved by that author in Section 436. That author states that compulsory insurance in connection with registration of titles, adopted by several of the States, which includes in it general compulsory mutual insurance, is not out of harmony with the American constitution, and that such legislation is getting more general in the United States, and has been general in Germany for a long time.

In Connecticut, Wisconsin, Ohio and Michigan legislation has been upheld, the principle of which is on all fours with the compulsory insurance of deposits and the taxation of the expenses thereof to the banks. It is the legislation which levies a tax for the keeping of each dog upon its owner, and therefrom constituting a fund for the payment of damages resulting to sheep from such dogs.

As Freund points out, a similar instance is a monthly tax put upon sailors for the maintenance of the marine hospital.

Confirmation in this court in the Gibbes case, 142 U. S., 386, of the South Carolina law creating a railroad commission to protect the public in transportation and putting the cost of that protection on the railways of the State, gives the key note of all the other legislation and the answer to all the cases cited by the Plaintiff in Error, which form the general doctrine that private property may not be taken for anything but a public use, and then only where adequate compensation is awarded.

In the Gibbes case, Mr. Justice Field used these very significant and discriminating words, 142 U. S., 391:

"If the tax were levied to pay for services in no way connected with the roads, as, for instance, to pay the salary of the executive or judicial officers of the State, whilst railroad corporations were at the same time subjected to taxation upon their property equally with other corporations for such expenses, and other corporations were not taxed for the salaries mentioned, there would be just ground of com-

plaint of unlawful discrimination against the railroad corporations, and of their not receiving equal protection of the laws."

Let us then first examine the cases upholding compulsory co-operation, as it is termed by Mr. Wilson—or, compulsory benefits, as termed by Mr. Freund.

## 21. COMPULSORY SUPPORT OF DECAYED PILOTS CONSTITUTIONAL.

First, the case of *Cooley vs. The Board of Wardens,* 12 How., 298, in which this court upheld a law levying pilotage fees on vessels, a portion of which went for the relief of distressed, decayed pilots. On page 313, Mr. Justice Curtis said:

"Nor do we consider that the appropriation of the sums received under this section of the act, to the use of the society for the relief of distressed and decayed pilots, their widows and children, has any legitimate tendency to impress upon it the character of a revenue law. Whether these sums shall go directly to the use of the individual pilots, by whom the service is tendered, or shall form a common fund, to be administered by trustees for the benefit of such pilots and their families as may stand in peculiar need of it, is a matter resting in legislative discretion, in the proper exercise of which the pilots alone are interested."

Here was a case of where the vessels paid part of the fees to the pilots themselves, and part of the fees that would go to the pilots went into a common fund for the benefit of all pilots. It may be said that the private property of these pilots was taken to be used for their benefit through compul-

sory co-operation, but in a way connected with their public duty as pilots, and, therefore, the law was sustained.

## 22. COMPULSORY CONTRIBUTION FOR DAMAGES DONE SHEEP BY DOGS CONSTITUTIONAL.

There is a group of cases sustaining the right of the State to tax the owners of dogs to create a fund out of which loss created by the dogs on sheep may be recouped. That legislation has in it all the elements of the Oklahoma safety fund law. While the direct question of the constitutionality of this acts as against the Fourteenth amendment is not discussed, yet the constitutionality from that point of view is taken for granted.

The first of these is *Tenney vs. Lentz,* 16 Wisconsin, 566. The laws of Wisconsin of 1860 provided for a license tax on dogs and gave an owner of sheep killed by dogs a right to be paid the damages thereof by the town in which the master of the dog lived, and the town was reimbursed from the dog tax fund. The court held: That this was a proper exercise of police power. Here was a tax on certain property, to-wit: dogs, or a license, to protect the public from something connected with the activity of the dogs, that is, the loss of sheep, falling within the rule laid down by this court in the Gibbes case.

The next case under the laws of Michigan of 1877, which appears in the case of *Van Horn vs. People,* 46 Michigan, 183. A charge was laid on the owners of dogs in the

character of a tax to raise a fund out of which damages done by dogs to sheep were to be paid. It was held: That this is not strictly a tax law, but an exercise of the proper police power of the State.

The next case is that of *Holst vs. Row,* 39 Ohio St., 340. In that, likewise, Section 2754, of the Revised Statutes of Ohio, provided a license tax on dogs, and Section 4215 provided that the special fund created by this tax should be devoted to the payment of losses sustained by owners of sheep killed by dogs, and the court held that this was a proper exercise of police power.

Again, *The Town of Wilton vs. The Town of Weston,* 48 Conn., 325, was a case where the laws of Connecticut, providing that the damage done by dogs to sheep, lambs or cattle, proved to the satisfaction of the selectmen to have been committed in either town shall be paid by such town and that the town might recover damage from the owner or keeper of the dog if a resident of such town; or, if of another town, of the town in which the owner or keeper lived. The funds thus to be paid out are to be realized not only by the right to sue the owner, but a special tax or license fee which, the keepers of dogs are compelled to pay upon penalty of being criminally prosecuted, raised the necessary revenue. This is set out at page 337 of the opinion. In this case the same argument was made exactly by the defendant as here by the original defendant. On page 330 of the brief for the Plaintiff in Error in that case it was said:

"The statute is invalid so far as it makes a town, and, consequently, every inhabitant, responsible for damage done by dogs whose owners reside within the town. This is opposed to natural right and justice. It can be sustained only upon the theory that the legislature has the right to say that the property of a town, and of A, an inhabitant thereof, shall be taken to pay B; the power to impose by statute upon a corporation a claim which it was never concerned in creating, against which it protects, and which is unconnected with the ordinary functions of municipal government. But the courts have repeatedly declared that if the courts should order a city or town to apply its funds or raise money by taxation to establish one of its citizens in business, or for any other object, no matter how worthy, equally removed from the proper sphere of government, the usurpation of authority would not only be plain and palpable, but the duty of the court to declare the order void would be imperative."

And to this objection, being the very objection of the Plaintiff in Error in this action, the court in that case said:

"But is the act valid in its method of accomplishing its objects in view?

"And this brings us to the precise point of objection. Why require the town to assume the burden of paying the damages in the first instance, and the bringing suit to recover the amount either of the owner of the dog or the town where he happens to reside?

"The general answer is, that as a system of police regulation it cannot well be made effectual for the accomplishment of the objects except through some such agency on the part of the towns.

"And, as to the objection that it is contrary to natural right and justice, our answer is:

"First. By the provisions of the act the town treasurer is relieved and replenished by the special tax or license fees which the keepers of all dogs are compelled to pay, upon penalty of being criminally prosecuted, or having the dogs killed or muzzled. In the long run these license fees will in all probability amount to more than any town will be required to pay.

"Second. The town called upon to pay the damages has by the same act a remedy over against the owner of the dogs doing the damage, and so finally the liability falls on the party in fault. The law assumes that this remedy over will be effectual.

"Third. In further vindication of the justice of casting the burden and duty upon towns to the extent mentioned, it should be observed that towns have some responsibility in the premises, and can do something to prevent or diminish the evils complained of."

This may be paraphrased here by calling attention—

First The safety fund is replenished and kept up by the assessment. It is thought that in the long run these assessments will in all probability amount to more than the figure required to be paid.

Second. The provisions giving a lien on the assets of the bank to secure the safety fund for all advances.

Third. In further vindication of the justice of casting the burden and duty upon the public to the extent mentioned it should be observed that the public has some responsibility in the premises and can do something to prevent or diminish the failure of banks.

Cooley, in his Constitutional Limitations, 7th Edition,

page 881, in the notes, approves of these cases, and they are announced as the settled law on the subject.

## 23. QUARANTINE FEES VALID.

A similar set of laws which cast a very strong light pointing toward the constitutionality of the Oklahoma banking law, is the law dealing with quarantine fees. In *Morgan Steamship Company vs. Louisiana Board of Health,* and another, 118 U. S., 455, this court passed upon a law of the State of Louisiana imposing a fee for the examination of a vessel putting into the ports of the State. A part of the fees so collected went to the salary of the examining officers and the balance to quarantine expenses, and this court upheld the constitutionality of the law on precisely that ground, taking the same view as in the Gibbens case where the court said that if the revenue collected from the railroads in South Carolina had gone to the salary of public officials not connected with the business of transportation that the law would have been void, but because the revenue therein collected was to pay for services connected with the railroads it was valid.

Mr. Justice Miller, speaking for this court said, in the case of *Morgan Steamship Company vs. Louisiana,* at page 461:

"We must examine into this proposition and see if anything in the Constitution sustains it. Is this requirement that each vessel shall pay the officer who examines it a fixed compensation for that service a tax? A tax is defined to be "a contribution imposed by government on individuals

for the service of the state." It is argued that a part of these fees go into the treasury of this State or of the city, and it is, therefore, levied as a part of the revenue of the State or city, and for that purpose. But an examination of the statutes shows that the excess of the fees of this officer over his salary is put into the city treasury to constitute a fund wholly devoted to quarantine expenses, and that no part of it ever goes to pay the expenses of the city or State government."

## 24. EXPENSE OF COMMISSIONS TO SUPERVISE PUBLIC UTILITIES PROPERLY PLACED ON UTILITY COMPANIES.

Next should be considered *Charlotte, Columbia and Augusta Railway Company vs. Gibbes*, 142 U. S., 386. To what has already been said it is only necessary to add that the court said, as to these railroads, speaking through Mr. Justice Field:

"Being the recipients of special privileges from the State, to be exercised in the interest of the public, and assuming the obligations thus mentioned, their business is deemed affected with a public use and to the extent of that use is subject to legislative regulation."

So, in this case, because the statutes of Oklahoma have made banking an exclusive privilege to Oklahoma corporations, thereby Oklahoma corporations, including the Plaintiff in Error, is the recipient of special privileges from the State, which are to be exercised in the interest of the public. The regulation of railroads should extend to everything that conecrns transportation, and the regulation of banking should extend to everything which is a part of bank-

ing. And the receiving and paying of deposits being as much, as was pointed out, a part of the public business of banking, revenue, or a special license tax in the nature of an assessment, proportioned in accordance to deposits, may be levied just as in the Gibbes case, which was in proportion to the number of miles of the road in the State, to make the public safe in that part of the business which is the public business. And in the opinion it is said:

"There are many instances where parties are compelled to perform certain acts and to bear certain expenses when the public is interested in the acts which are performed as much as the parties themselves. Thus, in opening, widening or improving streets, the owners of adjoining property are often compelled to bear the expenses or at least a portion of them, notwithstanding the work is done chiefly for the benefit of the public. So, also, in the draining of marsh lands."

Other instances follow, and finally the court says:

*"IN SUCH INSTANCES, WHERE THE INTEREST OF THE PUBLIC AND OF INDIVIDUALS IS BLENDED IN ANY WORK OR SERVICE IMPOSED BY LAW, WHETHER THE CAUSE SHALL BE THROWN ENTIRELY UPON THE INDIVIDUALS OR UPON THE STATE, OR BE APPORTIONED BETWEEN THEM, IS A MATTER OF LEGISLATIVE DIRECTION."*

In other words, whether the cost of seeing that the funds of the public deposited in banks given an exclusive franchise be borne by the State, by the banks, by the depositors, or by either or all, is a matter of legislative direction, and the State of Oklahoma having determined not to

put the cost on the State, and not to put the cost on the depositors, as Attorney General Bonaparte suggests, but upon the banks who make the profit out of the transaction, this court should find that this discretion is not unreasonably used.

## 25. OTHER INSTANCES OF COMPULSORY BENEFITS.

The cases cited by Mr. Justice Field in addition to *Morgan vs. Louisiana*, being *Nashville, Chattanooga and St. Louis Railway vs. Alabama*, 128 U. S., 98, where the cost of an examination of railway employes for color blindness was met by a fee charged by the examining officer, and Mr. Justice Field, again speaking for the court, said there:

"That this requirement was not depriving such persons of property without due process of law."

Likewise in *County of Mobile vs. Kimball*, 102 U. S., 691, where the expenses of improving the harbor of Mobile was put by the State statutes against the county of Mobile, although for the benefit of the whole State of Alabama, and as to that this court, speaking through Mr. Justice Field, said:

"That such costs may be apportioned ratably among the counties or other particular sub-division of the State, or the greater part may be laid upon one county," and then uses this language:

"It may be that the act in imposing upon the county of Mobile the entire burden of improving the river, bay and harbor of Mobile, is harsh and oppressive, and that it would

have been more just to the people of the county if the legislature had apportioned the expenses of the improvement, which was to benefit the whole State, among all its counties. But this court is not the harbor, in which the people of a city or county can find a refuge from ill-advised, unequal and oppressive State legislation. The judicial power of the Federal government can only be invoked when some right under the Constitution, laws or treaties of the United States is invaded. In all other cases the only remedy for the evils complained of rests with the people, and must be obtained through a change of their representatives. They must select agents who will correct the injurious legislation, so far as that is practicable, and be more mindful than their predecessors of the public interests."

It may be true that the Oklahoma law puts the entire cost of the safety fund on the banks, and it may be that the banks are not able to recoup this out of each one of the depositors thereby secured. It may be that the bank makes its profit out of only a portion of its depositors or out of persons who are not its depositors at all, and it may be that a fairer distribution of the burden would be to put it wholly on the depositors, as Attorney General Bonaparte suggests, or partly there—but, as against ill-advised legislation, if, for the sake of the argument, this be conceded to be such, as stated by Mr. Justice Field, "this court is not an harbor."

The Gibbes case was again referred to in *New York vs. Squire*, 145 U. S., 175, in which the salaries of the subway commissioners of the City of New York were put upon the electric companies doing business there, and that law was sustained upon the authority of the Gibbes case, and it was held not to deprive the companies of their property without due process of law.

The instances cited by this court in the Gibbes case of the costs of improvement being laid upon particular property, though the value of the improvement work for the benefit of many other persons, is illustrated in *Head vs Amoskeag Manufacturing Company,* 113 U. S., 9, in which it was held that a statute of a State authorizing any person to erect and maintain on his own land a water mill, a mill dam, upon any stream not navigable, paying to the owners of lands flood damages, assessed in a judicial proceeding. does not deprive them of their property without due process of law in violation of the Fourteenth amendment.

In *Wurtson, and another, vs. Hoagland, et al.,* 114 U. S., 606, a law providing for the draining of marshy lands, and to put the expenses upon all the owners, likewise was not held to deprive them of their property without due process of law, though the whole community got the benefit thereof. This rested upon *State vs. Newark,* 3 Dutcher, 185, and *Tidewater Company vs. Coslar,* 3 C. E. Green, 54, which asserts the same principles.

Likewise, in *State ex rel vs. Board,* 87 Minn., 325, 92 N. W., 216, is a well reasoned case on the proposition of whether construction of ditches, being authorized by an act, and the expense thereof being put upon contiguous property, whether the same was a proper exercise of police power, and in that case, at page 333, the court says:

"The question as to the propriety and necessity of legislation such as that here under consideration, if it only au-

thorizes the taking of private property for public use, is one exclusively for legislative ocgnizance, and with the exercise of its judgment in that behalf the courts have no power to interfere; and in respect to whether a statute providing a general system for draining wet and overflowed land of a State is a public necessity, and the interest and welfare of the people demand it, the courts are not concerned."

And as to whether a statute providing a safety fund for deposit is a public necessity, and whether the interest and welfare of the people demand it, is likewise one that does not concern the courts.

That a statute giving a lot owner the right to build a party wall partly upon the adjoining lot, and to recover from his neighbor a portion of the expenses thereof, is Constitutional and settled law. *Swift et al., vs. Calnan,* 102 Iowa, 136; 37 L. R. A., 462.

## 26. COMPULSORY SUPPORT OF FIREMEN.

Another class of statutes speak with great force against the contention that the creation of the safety fund is a deprivation of the property without due process of law. I refer to the statutes in various States collecting from insurance companies a license fee to go into a fund for the relief of firemen.

The first of these laws I have discovered is that contained in the *Firemen's Benevolent Association vs. Louisbury,* 21 Ill., 511, in which it was held that the legislature had the right to provide that foreign fire insurance companies may be burdened for the benefit of the Chicago Firemen's

Benevolent Association. By the statute of Illinois of 1852, the sum of $2.00 upon $100.00, and at that rate upon the amount of all premiums, were collected from all foreign fire insurance companies doing business in the city of Chicago to be paid to the Treasurer of the Firemen's Benevolent Association, the object of which was to be used for the relief of the distressed, sick, injured or disabled members of the fire department in that city. In that case the court said, through Chief Justice Caton:

"The other objection is, that here a revenue is attempted to be raised, not for State purposes, nor yet to meet any public exigency or want, but purely for the benefit of a private charity. That it is not required to be paid into the State Treasury, but must be paid to this private corporation for whose benefit the burden is imposed."

In answer to this he said:

"Let us once hold that the legislature could not compel any citizen to submit to a burthen, except for the benefit of the State aggregate, or for some sub-division of it, as a county of it, city or town, or to pay any money except it shall go into the State or some subordinate public treasury, and we should soon find ourselves on the brink of anarchy days * * * It is in the exercise of this indispensible power that ferries, toll bridges and the like are licensed or chartered. The legislature, finding it necessary to afford especial encouragement to private enterprise to erect a bridge or a ferry, has ever exercised the power of imposing a *burthen on some for the benefit of others * * * It is the power which the legislature possesses of imposing burthens upon certain members of the community who are supposed to be benefited by the efforts or acts of certain other*

*members of the community, as a reward or compensation for such acts.* This power is only exercised by prudent and judicious legislators, where it is supposed that the public have a general interest in the acts thus encouraged, and the individuals or classes upon whom the burthen is imposed, have a particular interest in the performance of the acts."

The next case I have found is *Fire Department of Milwaukee vs. Helfenstein,* 16 Wis., 142. By the act of 1852 of the State of Wisconsin, similar provisions were made as in the act from Illinois of the same date, for the benefit of the fire department of the city of Milwaukee. In that case it was objected to the law as in this acse—that it assumes to take the property of one person and transfer it to another without due process of law. The act directs that:

"The agent shall pay in to the government, or to the certain corporation, two per cent of all moneys received by him in certain fees."

It was answered to this by Dixon, Chief Justice, first, "that the act was a proper exercise of police power." And, further, the Chief Justice said:

"Whether these foreign insurance ocmpanies shall do business in this State or whether they shall be prohibited, is a matter which concerns the State and effects the public welfare. They may be permitted or prohibited; and, if permitted, the sovereign power may impose such restrictions and conditions as it sees fit, which can, in general, only be enforced by operating upon their agents and managers within the territory."

The power of the State over its own creatures, its own corporations, is no less great than its right to attach condi-

tions to the doing of business by foreign corporations. In each case the power of the state is limited by the provision of the Constitution that it shall not violate vested rights, and in giving to incorporators of the State of Oklahoma an exclusive franchise to do a banking business as a corporation, requiring, as the law does, the approval of the bank commissioner, the State could attach such conditions especially to this as in the wisdom of the legislature the necessities of the public welfare demand.

The next case is that of the *Trustees of the Exempt Firemen's Benevolent Fund of the City of New York vs. Roome,* 93 N. Y., 313. It was provided by the laws of New York that the agents of fire insurance companies doing business in the city of New York pay to the Trustees of the Exempt Firemen's Fund of the City of New York a percentage of the gross premiums received by them upon the insurance of property in that city. After giving a detailed history of the growth of the fire department in the city of New York, the court, at page 322, says:

"For some time a tax in the nature of a condition had been imposed by the State upon foreign insurance companies desiring to transact business within our jurisdiction. That tax was payable to the State, and the percentage upon the gross proceedings received or contracted to be paid. The success and safety of these companies, together with our own, would largely depend upon the skill and efficiency of the firemen, and this tax it was resolved to divert from the State treasury and make it payable to the fire departments of the State in such manner as would best promote their efficiency and to fill up their ranks with active, energetic

and prudent men * * * This statute was clearly a public and not a private act, and general instead of local. It was aimed to accomplish a public purpose; it was dictated by a consideration of public policy. Very soon after the passage of this act its constitutionality was questioned. *Fire Department of New York vs. Noble,* 3 E. D. Smith, 440, *The Same vs. Wright* 453 * * * It was claimed to violate the provisions of the Federal Constitution * * * which forbid the taking of private property for public use without just compensation. Neither objection prevailed."

The last case is that of the *Phoenix Insurance Company vs. The Fire Department of the City of Montgomery,* 42 L. R. A., 468. In that case, at page 471 of the L. R. A., Chief Justice Brickel discussed the question of the public or private purpose, and points out some of the decisions quoted by the Plaintiff in Error in this case, and following the other cases mentioned above, holds that the Alabama law, raising a fund by a taxation of insurance companies for the benefit of the fire companies in the City of Mobile, is not a deprivation of private property for private purposes, and this case points out that the cases to the contrary rest upon reasons which are inapplicable in Alabama, and an inquiry will show that they are also inapplicable in Oklahoma.

The case of *San Francisco vs. Liverpool, London and Globe Insurance Companies,* 74 California, 133, the power of the legislature to provide for such a firemen's benefit fund was forbidden by the California Constitution in its requirement that the legislature should not levy a tax for municipal purposes, while Oklahoma has a similar provision,

it has a direct provision authorizing the legislature to provide for the pension of firemen; and as far as the banking safety fund law is concerned, that, of course, would not be the provision of a tax for municipal purposes.

The Supreme Court of Nebraska, in *State vs. Wheeler,* 33 Nebr., 563, declared void a statute of Nebraska upon precisely the same ground as the California statute was declared void. The Nebraska decision is, therefore, not in point for the same reasons.

The cases of *State vs. Merchant's Insurance Company,* 12 La. Annual, 802, in that case the statute was held void because it applied solely to the city of New Orleans, and the Constitution of Louisiana required uniformity. It would, therefore, not be in point.

The only authority in point applicable to this case, holding that a State has not the authority to use the property of insurance companies for the benefit of the firemen, is the case of *Philadelphia Association vs. Woods,* 39 Pa., 73. That case was not decided upon any authority. It does not seem to be a well considered case, and puts its dissent from the other cases solely on the ground that such a statute is novel, strange and dangerous. Courts are without authority to declare statutes unconstitutional merely because they think them novel, strange or dangerous. Statutes should only be declared unconstitutional when it is clear beyond a reasonable doubt that the legislature was without authority to pass them.

## 27. INAPPLICABILITY OF CASES CITED BY PLAINTIFF IN ERROR.

The argument that the safety fund law of Oklahoma is the taking of private property for private purposes, and the inapplicability of the cases cited by Plaintiff in Error was well understood and clearly pointed out by the trial judge. He said:

"Counsel for the plaintiff argues ably that it (that is, the power to make the assessment) cannot come under this head (that is, police power), that the police power can only be applied to the protection of the public health and safety, and many cases are cited where, under the peculiar facts of each case, it has been held by our highest courts, that certain laws were unconstitutional because they provide for the taking of private property for private use. The case that originated in Topeka, where the municipality of the city, acting upon a vote of the citizens, issued one hundred thousand dollars worth of bonds to be given as a bonus to a bridge company for locating there, is relied upon. Mr. Justice Miller, of the Supreme Court of the United States, in a very strong opinion, pointed out that there were some things that even the people or a majority of them, could not do, that this was true in the very nature of things; that even the people themselves, being sovereign, still they could not by any act, take from the minority their private property and devote it to the use of some other private person. I think this must appeal to every one. But there was no question but what that was exactly what was sought to be done, and neither is there any question of police power in the case.

"The 'grasshopper' case, decided by Judge Brewer, is another case where it was sought to tax the people of certain townsites in order to raise a fund to loan to the suffering farmers. It perhaps was a popular measure and one that

might have resulted in great good, but it was a clear case of taxing private property for private use, and there was no semblance to the exercise of police power in so doing.

"The Maryland case, counsel contends, is this case. (The case referred to is 27 L. R. A., 72.) In that case, as I recollect it, a county, or the State, was authorized to issue bonds to an insolvent railroad corporation in order to enable it to pay its debts to the citizens. That was also the taking of private property for private use, and there was no question of regulating it involved.

Using these cases as a predicate, counsel for plaintiff argues that since this fund that is sought to be raised by the assessment complained of, for the purpose of paying the debts, that is, debts to depositors of any bank that may hereafter become insolvent, that the State might just as well provide for paying the debts of any other corporation, of railroad corporations, of gas companies, of electric light companies, and of any other company engaged in private business. But upon the other hand, as is pointed out by the Attorney General, the State will regulate all of these corporations, not to the extent of paying their debts, but to the extent of protecting the public in the transaction of the particular business in which they are engaged; that is, it will see that the public can travel over the railroads with safety; it will regulate the stringing and laying of wires, and the laying of pipes systematically and in proper places, so as to protect the public from harm, and also will regulate the charges of such corporations. But bankers are not engaged in transporting passengers or freights, nor in transporting electric currents, nor gas; their entire business upon one side of the ledger is in taking the people's money on deposit."

## 28. IS BANKING A FRANCHISE IN OKLAHOMA? IF SO, CAN CONDITIONS BE ATTACHED?

We now come to the consideration of the questions that grow out of the provision of the Oklahoma statute making banking a franchise. The decision of the Supreme Court of the State apparently took no cognizance of this question, or thought it of little importance in the determination of the case. This view was shared by the trial judge in his extremely able opinion. Quoting further from that I cite the following:

"Has the legislature the right, under the police power, to regulate this business? Can the legislature provide rules and regulations for the protection of these deposits and those who make them? Under the law, I am of the opinion that only corporations, banking corporations, can engage in the business of banking in this State, and individuals can not. The banking corporations, therefore, have a monopoly of the banking business. This is given to them by the law. Enjoying this monopoly that is given them must they not be subject to all the rules and regulations reasonably imposed upon them by the law? And do not these regulations apply both to those corporations who have been chartered heretofore—before the late law went into effect—as well as those who may be chartered hereafter?

That is a condition upon which the banking corporations heretofore chartered may continue to do business."

I have already quoted Zane on Banking, Sections 7 to 15, as bearing upon the right of the State to make banking a franchise.

Section 1 of the Banking Act of 1899 of Oklahoma

Territory, under which Plaintiff in Error pleads it was incorporated, provided:

"That any three or more persons, a majority of whom shall be residents of this Territory, may organize themselves into a banking association and be incorporated as a bank, and shall be permitted to carry on the business of receiving money on deposit," etc. * * * "and provided that all banking institutions now organized as corporations doing business in this Territory are hereby permitted to continue such business as at present incorporated. But in all other respects their business and the manner of conducting the same and the operation of said bank shall be carried on subject to the provisions of this act and in accordance therewith."

A similar provision was carried into all other banking acts from that time and repeated in the Act of 1907. Section 1 of Article 1, of Chapter 6, of the laws of 1907, provide:

"That any three or more persons approved by the bank commissioner, a majority of whom shall be residents of this State, may execute articles of incorporation and be incorporated as a banking corporation in the manner hereinafter provided * * * "

Section 2 provides that when the capital stock of any bank shall have been paid up, and other conditions, which, after they shall have been performed, then a certificate shall be issued by the bank commissioner showing that it (that is, the corporation) has been organized, and that its capital is paid in as required by law, and is authorized to transact a general banking business.

Section 3 provides:

"That a banking corporation organized under the pro-

visions of this act shall be permitted to receive money on deposit to such an amount in proportion to its paid up capital, and surplus as may be fixed by the bank commissioner * * * And provided further that all banking institutions now organized as corporations doing business in this State are hereby permitted to continue said business as at present incorporated, but in all other respects their business and the manner of conducting the same and the operation of said bank shall be carried on subject to the laws of this State."

This act was approved May the 26th, 1908. By the terms of Section 3, providing that all banking institutions now organized as corporations doing business in the State are permitted to continue, but that the operation of the bank shall be carried on subject to the laws of the State, and the laws of the State requiring a certain amount of capital stock and incorporation, and the only banks then existing which are allowed to continue being corporations, these provisions amount to a denial of the common law right, of banking to any individual and confining it to corporations solely.

The authority of Zane on Banking, Sections 7 to 15; of Morse on Banks, Section 13; of *State vs. Woodmanse,* N. Dakota, 11 L. R. A., 420; of *Meyers vs. Manhattan Bank,* 20 Ohio, 295; of *State vs. Stebbins,* 1 Stewart (Ala.), 299; the authority of these is to the effect that banking may be made a franchise, and certainly, as far as the Plaintiff in Error is concerned, it cannot be questioned because they adopted that form in which to do business.

It may be objected that the State did not have this

power. The notes to *State vs. Richcreek*, 5 L. R. A., 875, cover the subject but do not state the law as to the power of the State in this regard, with due consideration of all the rights of the State. Mr. Justice Field, speaking for this court, in *Crowley vs. Christensen*, 137 U. S., at page 89, said:

"It is undoubtedly true that it is the right of every citizen of the United States to pursue any lawful business, under such restrictions are imposed upon all persons of the same age, sex and conditions. But the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right of others."

And, again, in *Gundling vs. Chicago*, 177 U. S., at page 188, Mr. Justice Peckham, speaking for this court says:

"Regulations respecting a pursuit of a lawful trade or business are of very frequent occurrence in the various States of the country, and what such regulations shall be and to what particular trade, business or occupation they shall apply are questions for the State to determine, and their determination comes within the proper exercise of the police power of the State, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the proper and personal rights of the citizens are necessarily, and in a manner wholly arbitrary, interfered with or disturbed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference."

These two decisions stating the general law, and in

view of the decision of *Bank vs. Earle*, 13 Peters, 519, 596, it certainly cannot be held that the law making banking a franchise in Oklahoma was an unreasonable and unwarrantable interference with private business.

## 29. HE WHO HAS THE BENEFIT OF A MONOPOLY MUST BEAR THE BURDEN OF PUBLIC CONTROL.

In *Allnutt vs. Inglis*, 12 East, 527, decided in the King's Bench, 1810, Lord Ellenborough, in regard to the legal monopoly given the London Dock Company to have their warehouses the only bonded warehouses for wines, said:

"There is no doubt that the general principle is favored both in law and justice, that every man may fix what prices he pleases upon his own property or the use of it; but if, for a particular purpose the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must as an equivalent perform the duty attached to it on reasonable terms."

In the case of *Munn vs. Illinois*, 94 U. S., 113, this court, speaking through Chief Justice Waite, said:

"Neither is it a matter of any moment that no precedent can be found for a statute precisely like this * * * And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long known and well established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property,

but to clear their obligations if they use it in this particular manner.

It matters not in this case if these Plaintiffs in Error had built their warehouses and established their business before the regulations complained of were adopted. What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good. They entered upon their business and provided themselves with the means to carry it on subject to this condition. If they did not wish to submit themselves to such interference, they should not have clothed the public with an interest in their concerns."

And, as long ago as Lord Chief Justice Hale, in *De Portibus Maris,* 1 Harg. Law Tracts, 78, said:

"Property does become clothed with a public interest when used in a manner to make it a public consequence and effect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."

Therefore, if banking is a franchise in Oklahoma, is a legal monopoly to be exercised only by Oklahoma Corporations of the kind specified in the statute, and if it is a public business, here we have the stockholders of the Noble State Bank possessing a legal monopoly in a public business. They have extended their property to the use of the public, and as long as they choose to stay in the banking business,

they must grant the public the right to regulate it in a reasonable way. They are not compellable to give the public this control. But, if they put themselves in a condition where the public must resort to their property, then the public has a right to regulate its use, and such a regulation is not a deprivation of their property.

If the State then had this right it had the right to impose any condition to the exercise of the franchise that would not be confiscation, and if it imposed the same conditions upon all, the only question left to consider is whether the imposition of this condition in the year 1908 upon a corporation chartered in 1899 was an interference with its vested right.

## 30. CONTROL BEING POLICE POWER DOES NOT VIOLATE VESTED RIGHTS.

As to this question, the Plaintiff in Error in his brief, at page 58, says:

"It is doubtless true that such a law (that is, the Oklahoma Guaranty Deposit law), could be enforced as to banks chartered after its passage. Because then it would be optional with the persons desiring to organize a bank to incorporate or not as they liked."

If this admission of the Plaintiff in Error would be accepted as the law by the court, why I should have been saved the necessity of all the argument up to this point, because it must be admitted that such a law could not be passed by the Oklahoma legislature even as to corporations thereafter chartered unless in the exercise of its proper

police power. And that if it could properly be exercised as to banks thereafter chartered, being the exercise of police power, it would apply solely to all corporations theretofore chartered because the State cannot grant away the exercise of its police power.

*Sioux City Street Ry. Co. vs. Sioux City*, 138 U. S., 98; *New York, New Haven Rr. Co. vs. Bristol*, 151 U. S., 556, particularly at page 567, where Justice Fuller, speaking for this court, says:

"It is likewise thoroughly established in this court that the inhibition of the Constitution of the United States upon the impairment of the obligation of contract or the deprivation of property without due process or the equal protection of law by the States, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulations, partial to the preservation of the community from injury," citing many cases.

"And also that 'a power reserved to the legislature to alter, amend, or repeal a charter authorizes it to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested in it, and which the legislature may deem necessary to secure either that object or any public right.'"

Citing authorities.

See also *N. Y., N. Y., etc. Co. vs. Int. Com. Com.*, 200 U. S., 361.

In adopting the Depositors' Guaranty Fund law no in-

terference was had with the vested rights of the plaintiff.

*Cummings vs. Spaunhorst*, 5 Mo. App., 21.

The plaintiff makes two principal contentions:

First. That the statute constitutes a taking of property.

Second. That by the changes it introduces into banking it tends to abrogate the obligations of a contract with him.

As property can be taken, by due process of law, (1) under the police power, (2) or by taxation, it is admitted that if it is a taking it must be justified under one or the other of these heads. But the State does not concede that the plaintiff's property is taken. It maintains that the banking law is only a regulation of the plaintiff's property for his own safety and that of others doing business with him; is not a taking of his property but simply requires him to devote a portion of it to a use that preserves the other portions and is for his benefit as well as the common welfare. If it is a taking it is not attempted to be justified as taxation, because it is not a tax on the business of banking, but it is justified as a police measure. The lower court held that under the laws of this State banking was an exclusive franchise.

There is no doubt that the right of corporations to issue stock is a franchise.

House Bill No. 333, which was approved and became a law February 12, 1908, provided:

"And provided that all banking institutions now organized as corporations doing business in this State, are hereby permitted to continue said business as at present incorporated, but in all other respects their business, and the manner of conducting the same, and the operations of said bank shall be carried on subject to the laws of this State and in accordance therewith."

## 31. PLAINTIFF'S RIGHT TO SPECIFICALLY SUBJECT TO AMENDMENT.

The particular provisions of the law thus establishing the Depositors' Guaranty Fund, where by reason of the provisions which became law December 17, 1907. The provisions from the law of February 12, 1908, are the exact meaning of the provisions of Section 1 of the Banking Act of 1899, under which the Noble State Bank was incorporated, as stated in the first part of brief.

In the last line the law of 1899 says "provisions of this act," whereas, the law of 1908 says, subject to "the laws." The right of the legislature to amend every charter under Section 932 of Wilson's statutes, makes the two identical in meaning.

The act of February 12, 1908, if it is constitutional, compels this plaintiff, being a corporation, to conduct all its business subject to the laws of the State and in accordance therewith; and the laws of the State require a Depositors' Guaranty Fund to be raised by an assessment.

As the paintiff was a corporation and as the law of Feb. 12, 1908, requires none but corporations doing business as

banks to comply with the law, the question of whether our Banking law makes the banking business an exclusive franchise, a monopoly, and whether it could do so if attempted is immaterial to this case.

But there was a stipulation at the time the charter was issued to the plaintiff that its busines should be conducted in accordance with what the law was at that time, subject to amendment by the legislature in the future. And, therefore, if the legislature has changed it or has made it an exclusive franchise, that cannot be complained of by the plaintiff upon that very condition all his rights were based.

We have endeavored to show that all of the authorities regarded the banking business, the warehouse business, and the insurance business as businesses of like kind and nature, and that the right of the legislature to regulate, and the exercise of that right, are similar among them all. Therefore the case of Attorney General vs. North American Life Insurance Co., 82 N. Y. 172, is peculiarly in point. It was a case in which a charter had been given to a life insurance company with a right to the legislature to amend and repeal the charter; and subsequently the legislature determined to require that and like insurance companies to make a deposit with a state officer as an indemnity against its liability. The insurance company objected, as the plaintiff bank does here, that such a law was a taking of its property, and the violation of a contract. Upon both matters the Court decided against it, and its decision should be controlling in this case:

"It is further contended that the act of 1869 violates

both the State and Federal Constitutions, in that its provisions deprive life insurance companies of their property without due process of law. This is plainly not so. Section 7 of that act provides that if at any time the affairs of any life insurance company which has deposited securities under the act shall, in the opinion of the superintendent of the insurance department, appear in such a condition as to render the issuing of additional policies and annuity bonds by such company injurious to the public interest, the superintendent shall report that fact to the Attorney General, whose duty it shall then be to apply to the Supreme Court for an order requiring the company to show cause why its business should not be closed. The Court, must, thereupon, proceed to hear the allegations and proofs of the respective parties, and, in case it shall appear to the satisfaction of the Court that the assets and funds of the company are not sufficient to justify the further continuance of the business of insuring lives, granting annuities and incurring new obligations, as authorized by its charter, then the Court must issue an order enjoining and restraining the company from the further prosecution of its business, and appoint a receiver of all the assets and credits of the company. The legislature had the right to alter or repeal any law under which these companies were organized, and thus prescribe the conditions upon which their existence could be continued or terminated. It could terminate the existence of every insurance company in this state, without violating any constitutional provision. What it did in this act was to provide a way for the arresting of the operations of any insurance company when its condition became such that its continuance in business would be detrimental to the interests of the public. The methods provided are not arbitrary. There is first the judgment of the superintendent, and then a hearing before the Court, subject to a right of final appeal to this Court. (In re Atlantic Life Ins. Co., 74 N. Y. 177.) If the Court shall determine that the company ought not to continue business

for the reasons stated in the act, a receiver must be appointed for the purpose of administering its assets. That is the orderly way generally adopted for winding up the affairs of corporations which go into liquidation. The corporation in such case, is, in no proper sense, deprived of its property. That is taken for the payment of its debts and distribution among those who are entitled to the same. Section 8 provides that the receiver shall at once appoint an actuary, who shall investigate the affairs of the company and make his report to the Court and to the receiver, and if he shall find that the securities deposited by the company in the insurance department, and the assets and credits, including future premiums on outstanding policies and other obligations, are sufficient under the laws of this state, to pay all the policies, annuities and other obligations of the company, as they mature by the terms thereof, and the legal costs and expenses, and if his report shall be confirmed by the Court, then the receiver may continue to receive premiums and payments upon the policies and other obligations of the company, thus carrying them to maturity, or he may, under the direction of the Court, reinsure in some other company all the outstanding risks. It is ocmplained that a company may thus be solvent, and yet its business may be arrested. That is undoubtedly so. The management, credit and condition of a life insurance company, although solvent, may be such that it might be injurious to the public interest to permit it to continue its business. But it does not necessarily follow that a company must be wound up, notwithstanding it shall appear upon the report of the actuary that it is perfectly solvent. If the Court shall, after the appointment of a receiver, become satisfied that he was improvidently appointed, under a mistake as to the true condition of the company, and that the company is abundantly solvent, and can with safety and propriety be permitted to resume and continue its business, its power to vacate the order appointing the receiver, and to discharge the receivership, cannot be doubted; and

in such event, the appointment of the actuary, and his proceedings, which depend upon the receivership will not be permitted to stand in the way. If, however,—as was the case here—the report of the actuary shall show the company to be insolvent, there certainly can be no well-founded claim that the proceedings provided by the statute are unusual, arbitrary, violative of any fundamental principle of justice, or that there is the absence of that due process of law which has always been usual in such cases.

The claim is also made that the Registration Acts impaired the obligation of the contracts between the company and its members, contained in the policies issued to such members. But it is clear that the obligations of the company were in no way interfered with or impaired. The company remained liable to discharge all its obligations just as it made them, and precisely according to their terms. The holders of non-registered policies had no lien upon the property of this company at the time of the passage of these acts, and they were therefore deprived of no lien. Laws abolishing imprisonment for debt and distress for rent, and increasing the amount of property exempt from execution, have been held not to impair the obligation of contracts previously existing. Laws could be passed giving servants a preference of payment in all cases out of the estates of their employers, without impairing the obligation of other contracts entered into with such employers. So the legislature could, for reasons of public policy and justice, give classes of creditors preference over other classes, so long as creditors not preferred were left with substantial remedies.

Here the holders of registered policies were given a preference of payment upon a fund substantially created with money contributed by them. The special fund created for their benefit could never, in the ordinary management of a company, be greater than the money contributed by such policy-holders, and it seems to me quite absurd to

say that a provision that they should have payment out of such fund in preference to other policy-holders, violated the obligation of any contract within the meaning of the Constitution. A debtor does not violate the obligations of contracts with other creditors by pledging to a class of his creditors a portion or all of his property for the purpose of securing their claims; and the same must be true of an insurance company which sets apart a portion of its assets in pursuance of law for the purpose of securing a certain class of its creditors.

Without further elaboration, I conclude that the objections to the Registration on constitutional grounds are without any foundation."

## 32. IF LAW VOID AS TO NEW, IT IS AS TO OLD CONCERNS.

In the case of State vs. Richcreek, 77 N. E. 1085, 5 L. R. A., New Series, 874, a case particularly in point, in discussing the applicability of the 14th Amendment to the Constitution of the United States, the court says:

"Neither the amendment—broad and comprehensive as it is,—nor any other amendment was designed to interfere with the power of the State, sometimes termed its police powers, to prescribe regulations, to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity."

Therefore, if we adopt as settled the statement of the plaintiff in error, contained on page 85 of his brief, that "it is doubtless true that such a law could be enforced as to banks chartered after its passage," then we must conclude

that it also could be enforced as to all banks chartered before its passage.

A case like this was that of People, ex rel., New York Electric Lines Co., vs. Squire, 107 N. Y., at page 593, and this court, in forming the judgment of the court of appeals of the State of New York, 145 U. S. 175, especially approved of the language used in that opinion. The question was whether the act of 1885, providing:

"For the placing of electrical condutcors under ground in the cities of the state, and for commissioners of electric sub-ways, in so far as it affected corporations organized before its passage, was obnoxious to provisions of the constitution in impairing the obligations of contracts, or did it only destroy or materially impair or restrict any franchise or contract rights previously secured.

The act put the expense of the change upon all companies whether thereafter or theretofore created. The court held that: Putting an additional condition upon the manner of the exercise of the franchise, and even an additional burden, was not materially taking away the property of the corporations previously created.

33. QUESTION OF SUFFICIENCY OF PETITION.

The Supreme Court of Oklahoma further held that:

"The original petition of the plaintiff in error filed in the court below did not state facts sufficient to constitute a cause of action."

This, of course, is a non-federal question, is a matter of State practice, and, therefore, not a question of Federal

law. Jurisdiction and Procedure of the Supreme Court, by Taylor, Section 28, and authorities there cited.

It may be claimed that this decision, in view of the holding of this court on a like point, in Osborne vs U. S. Bank, 9 Wheat., 838, is itself depriving plaintiff in error of his property without due process of law. But if this latter view be not taken by this court, and if it be regarded as a decision upon the question of state practice and a non-federal question, then because it is upon an opinion broad enough to sustain the whole decision, this appeal should be dismissed. Taylor, Jurisdiction and Procedure, of the U. S. Supreme Court, Chapter 19, Section 238, et seq., page 434 and following. Respectfully submitted,

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APPENDIX "A."

HOUSE BILL NUMBER 11—A.

AN ACT.

*Creating a State Banking Board, Establishing a Depositors' Guaranty Fund to Insure Depositors Against Loss When the Bank becomes Insolvent, Prescribing the Qualifications of Officers and Directors, Fixing the Sal-*

*ary of Bank Commissioner and his Assistants and Providing for more Frequent Examinations, Fixing Penalty for Embezzlement, limiting the Amount of the Bank Funds that can be loaned to any one person, corporation or firm, Declaring an Emergency.*

BE IT ENACTED B YTHE PEOPLE OF THE STATE OF OKLAHOMA:

Section 1. A State Banking Board is hereby created, to be composed of the Governor, the Lieutenant Governor, President of the State Board of Agriculture, State Treasurer and the State Auditor.

Section 2. Within sixty days after the passage and approval of this act, the State Banking Board shall levy against the capital stock an assessment of one per cent of the bank's daily average deposits, less the deposits of the State funds, properly secured for the preceding year, upon each and every bank organized and existing under the laws of the State, for the purpose of creating a Depositors' Guaranty Fund. Said assessment shall be collected upon call of the State Banking Board. In one year from the time the first assessment is levied, and annually thereafter, each bank subject to the provisions of this Act shall report to the Bank Commissioner the amount of its average daily deposits for the preceding year, and if said deposits are in excess of the amount upon which one per cent was previously paid, said report shall be accompanied by additional funds to equal one per cent of the said daily average excess of deposits, less the deposit of State funds properly secured and less the deposits of the National Government for the year over the preceding year, and each amount shall be added to the Depositors' Guaranty Fund. If the Depositors' Guaranty Fund is depleted from any cause, it shall be the duty of the State Banking Board in order to keep said fund to one per cent of the total deposits in all of the said banks subject to the provisions of this Act, to levy a spe-

cial assessment to cover such deficiency, which special assessment shall be levied upon the capital stock of the banks subject to this Act, according to the amount of their deposits as reported in the office of the Bank Commissioner. And said special assessment shall become immediately due and payable.

Section 3. Banks organized subsequent to the enactment of this Act, shall pay into the Depositors' Guaranty Fund, three per cent of the amount of their capital stock when they open for business, which amount shall constitute a Credit Fund, subject to adjustment on the basis of its deposits as provided for other banks now existing at the end of one year. *Provided, however,* said three per cent payment shall not be required of new banks formed by the reorganization or consolidation of banks that have previously complied with the terms of this Act.

Section 4. Any National Bank in this State approved by the Bank Commissioner, may voluntarily avail its depositors of the protection of the Depositors' Guaranty Fund, by application to the State Banking Board, in writing and the said application may be sustained upon terms and conditions in harmony with the purpose of this Act, to be agreed upon by the State Banking Board, the Bank Commissioner and the Comptroller of the Currency of the United States; *provided,* that in the event National Banks should be required by Federal enactment to pay assessments to any Depositors' Guaranty Fund of the Federal Government, and thereby the depositors in National Banks in the State should be guaranteed by virtue of Federal laws, that the National Banks having availed themselves of the benefits of this Act may withdraw therefrom and have returned to them ninety per cent of the unused portion of all assessments levied upon and paid by said banks.

Section 5 Whenever any bank organized or existing under the laws of this State shall voluntarily place itself in

the hands of the Bank Commissioner, or, whenever any judgment shall be rendered by a Court of competent jurisdiction, adjudging and decreeing that such bank is insolvent, or whenever its rights or franchises to conduct a banking business under the laws of this State shall have been adjudged to be forfeited, or, whenever the Bank Commissioner shall become satisfied of the insolvency of any such bank, he may, after due examination of its affairs, take possession of said bank and its assets, and proceed to wind up its affairs and enforce the personal liability of the stockholders, officers and directors.

Section 6. In the event that the Bank Commissioner shall take possession of any bank which is subject to the provisions of this Act, the depositors of said bank shall be paid in full, and when the cash available or that can be made immediately available of said bank is insufficient to discharge its obligations to depositors, the said Banking Board shall draw from the Depositors' Guaranty Fund and from additional assessments, if required, as provided in Section 3, the amount necessary to make up the deficiency, and the State shall have for the benefit of the Depositors' Guaranty Fund, a first lien upon the assets of said bank, and all liabilities against the stockholders, officers and directors of said bank and against all other persons, corporations or firms. Such liabilities may be enforced by the State for the benefit of the Depositors' Guaranty Fund.

Section 7. The Bank Commissioner shall take possession of the books, records and assets of every description of such bank, collect debts, dues and claims belonging to it, and upon order of the District Court or Judge thereof, may sell or compound all bad or doubtful debts, and on like order may sell all the real or personal property of such bank upon such terms as the Court or Judge thereof may direct, and may, if necessary, pay the debts of such bank, and then enforce the liabilities of the stockholders, officers and di-

rectors; *Provided, however,* that bad or doubtful debts as used in this section shall not include the liabilities of stockholders, officers or directors.

Section 8. It shall be the duty of the Bank Commissioner, or one of his assistants, to visit each and every bank subject to the provision sof this Act at least twice each year, and oftener if he deem it advisable, for the purpose of making a full and careful examination and inquiry into the condition of the affairs of such bank, and for that purpose, the Bank Commissioner and his assistants are hereby authorized and empowered to administer oaths, and to examine under oath the stockholders and directors and all officers and employees and agents of such banks or other persons. The Commissioner shall reduce the result thereof to writing, which shall contain a full, true and careful statement of the conditions of such bank, and file and retain the same in his office.

Section 9. The Bank Commissioner's salary shall be twenty-five hundred dollars ($2500.00) per annum and traveling expenses, and he shall appoint subject to the approval of the Governor, necessary assistants, and the salary of each assistant shall not exceed fifteen hundred dollars ($1500.00) per annum and traveling expenses.

Section 10. The Bank Commissioner shall deliver to each bank that has complied with the provisions of this Act, a certificate stating that said bank has complied with the laws of this State for the protection of bank depositors, and that safety to its depositors is guaranteed by the Depositors' Guaranty Fund of the State of Oklahoma. Said certificate shall be conspicuously displayed in its place of business and said bank may print or engrave upon its stationery and advertising matter words to the effect that its depositors are protected by the Depositors' Guaranty Fund of the State of Oklahoma. The printing or engraving of a false

statement to the fact last before this named is hereby declared to be a felony.

Section 11. After the Bank Commissioner shall have taken possession of any bank which is subject to the provisions of this Act, the stockholders thereof may repair its credit, restore or substitute its reserves and otherwise place it in condition so that it is qualified to do a general banking business as before it was taken possession of by the Bank Commissioner; but such bank shall not be permitted to reopen its business until the Commissioner, after a careful investigation of its affairs is of the opinion that its stockholders have complied with the laws, that the bank's credit and funds are in all respects repaired, and all advances, if any, made from the Depositors' Guaranty Fund fully repaid, its reserve restored or sufficiently substituted, and that it should be permitted again to reopen for business; whereupon said Bank Commissioner is authorized to issue written permission for reopening of said bank in the same manner as permission to do business is granted after the incorporatoin thereof, and thereupon said bank may be reopened to do a general banking business.

Section 12. No person shall be eligible as director of any bank organized or existing under the laws of this State unless being otherwise qualified he is also, the bona fide owner of five hundred dollars ($500.00) of the stock of such bank fully paid and not hypothecated. Such stock shall not be pledged for any loan or debt. Any director, other officer or person who shall participate in any violation of the laws of this State relative to banking and banks shall be liable for all damages which the said bank, its stockholders, depositors or any other person shall sustain in consequence of such violation.

Section 13. It shall be unlawful for any active managing officer of any bank organized or existing under the laws of this State, to borrow, directly or indirectly, money

from the bank with which he is connected. The officer authorizing a loan to any of said persons, as well as the person receiving the same, shall be deemed guilty of larceny of the amount borrowed.

Section 14. Every president, director, cashier, teller, clerk, officer or agent of any bank who wilfully embezzles, abstracts or misapplies any of the moneys, funds, securities, or wilfully assigns any note, bond, draft, bill of exchange, mortgage, judgment or decree, or who wilfully makes use of the bank in any manner with intent in either case to injure or defraud the bank or any individual, person, company or corporation, or to deceive any officer of the bank, and any person who with like intent aids or abets any officer, agent or clerk in any violation of this section, shall be deemed guilty of larceny, and upon conviction thereof shall be punished as for larceny of the amount directly involved.

Section 15. Every bank doing business under the laws of this State shall have on hand at all times in available funds the following sums, to-wit: Banks located in towns or cities having a population of less than twenty-five hundred persons, an amount equal to twenty-five per cent of their entire deposits; banks located in cities having over twenty-five hundred population, an amount equal to twenty-five per cent of their entire deposits, two-thirds of which may consist of balances due to them from good, solvent banks, selected from time to time with the approval of the Bank Commissioner, and one-third shall consist of actual cash; *Provided*, that any bank that has been made the depository for the reserve of any other bank or banks shall have on hand at all times in the manner provided herein twenty-five per cent of its deposits. Whenever the available funds in any bank shall be below the required amount, such bank shall not increase its liabilities by making any new loans or discounts otherwise than the discounting or purchasing bills of exchange payable at sight, nor make

any dividends of its profits, until the required proportion between the aggregate amount of its deposits and its lawful money reserve has been restored; and the Bank Commissioner shall notify any bank whose lawful money reserve shall be below the amount required to be kept on hand to make good such reserve, and if such bank or association shall fail to do so for a period of thirty days after such notice, it shall be deemed to be insolvent and the Bank Commissioner shall take possession of the same and proceed in the manner provided in this Act relating to insolvent banks. The Bank Commissioner may refuse to consider, as a part of its reserve, balances due to any bank from any other bank or association which shall refuse or neglect to furnish him with such inforamtion as he may require from time to time relating to its business with any other bank doing business under this Act which shall enable him to determine its solvency. *Provided*, that all savings banks or saving associations which do not transact a general banking business shall be required to keep on hand at all times in actual cash a sum equal to ten per cent of their deposits, and shall be requred to keep a like sum invested in good bonds of the United States or State, county, school district or municipal bonds of the State of Oklahoma, worth not less than par.

Section 16. The total liabilities to any bank of any person, company, corporation or firm ,for borrowed money, including the liabilities of the company or firm, and the liabilities of the several members thereof shall not at any time exceed twenty per cent of the capital stock of such bank, actually paid in, but the discount of bills of exchange drawn in good faith against actual existing values, as collatteral security, and a discount of commercial paper, actually owned by the person, shall not be considered as money borrowed. *Provided, however*, that any bank without impairing its reserves, may advance funds to any person, company, corporation or firm, to assist in marketing agricultural products, in amounts not exceeding seventy-five per cent of its paid up capital, such advances or loans must be limited to

seventy-five per cent of the actual cash market value of such products, secured by elevator receipts, warehouse certificates, or yard tickets with the fire insurance policies in amount to guarantee the bank against loss. The Bank Commissioner shall require any bank to reduce or liquidate any of the aforesaid loans when he deems the security insufficient; believes that the loans are being carried for speculation, or that the condition of the bank will not justify such loans.

Section 17. The violation of any of the provisions of this Act by the officers or directors of any bank organized or existing subject to the laws of this State shall be a sufficient cause to subject the said bank to be closed by the Bank Examiner and for the annulment of its charter.

Section 18. Any officer of a bank found by the Bank Commissioner to be dishonest, reckless or incompetent, shall be removed from office by the Board of Directors of the bank of which he is an officer, on the written order of the Bank Commissioner.

Section 19. The expense of administering the Depositors' Guaranty Fund by the State Banking Board shall be paid from said fund.

Section 20. All acts and parts of acts in conflict with this Act, be, and the same are hereby repealed.

Section 21. For the preservation of the public safety, this Act is declared to be an emergency and shall become effective immediately after its passage and approval.

WM. H. MURRAY,
Speaker of the House.

GEO. W. BELLAMY,
President of the Senate.

Approved December 17th, 1907.

C. N. HASKELL,
Governor of the State of Oklahoma.

(SEAL)

Attest:

BILL CROSS,
Secretary of State.

By LEO MEYER, Deputy.

## APPENDIX "B."

## HOUSE BILL NO. 333.

## AMENDING THE BANKING LAW

*Be It Enacted by the People of the State of Oklahoma:*

Section 1. That Section 1, Chapter 4, of the Session laws of 1899 of Oklahoma Territory be and the same is amended to read as follows:

Section 1. Any three or more persons, a majority of whom shall be residents of this State, may organize themselves into a Banking Association, and be incorporated as a bank, and shall be permitted to receive money on deposit to such an amount in proportion to its paid up capital and surplus as may be fixed by the Bank Commissioner, and to pay interest thereon not to exceed the rate that may from time to time be fixed by the Bank Commissioner as the maximum rate that may be paid upon deposits by banks in this State; to buy and sell exchange, gold, silver, coin, bullion, uncurrent money, bonds of the United States, or of this State, or of any city, county, school district, or other municipal corporation thereof, and State, county, city, township, school district, or other municipal indebtedness; to lend money on chattel and personal security, or on real estate secured by first mortgages, running not longer than one year, provided that such real estate loans shall not

exceed twenty per cent of the authorized loans of any such bank; to own a suitable building, furniture, and fixtures, for the transaction of its business, the value of which shall not exceed one-third of the capital of such bank fully paid: Provided, that nothing in this section shall prohibit such bank from holding and disposing of such real estate as it may acquire through the collection of debts due it; and provided further, that all banking institutions now organized as corporations, doing business in this State, are hereby permitted to continue said business as at present incorporated, but in all other respects, their business, and the ammner of conducting the same, and the operation of said bank, shall be carried on subject to the laws of this State, and in acocrdance therewith; and provided further, that no bank, except those that have complied with, or that may be organized under the laws of this State relating to Trust Companies, shall engage in any business other than is authorized by this act.

Section 2. That Section 4 of an Act entitled :"An Act creating a State Banking Board, establishing a Depositors' Guaranty Fund to insure depositors against loss when the bank becomes insolvent, prescribing the qualifications of officers and directors, fixing the salary of Bank Commissioner and his assistants and providing for more frequent examinations, fixing penalty for embezzlement, limiting the amount of the bank funds that can be loaned to any one person, corporation or firm, declaring an emergency: "Approved Decemebr 17th, 1907, be and the same is hereby amended to read as follows:

Section 4. Any National Bank in this State approved by the Bank Commissioner, may voluntarily avail its depositors of the protection of the Depositors' Guaranty Fund, by application to the State Banking Board, in writing, and the said application may be sustained upon terms and conditions in harmony with the purpose of this Act, to be agreed upon by the State Banking Board, and the Bank Commis-

sioner; provided, that in the event National Banks should be required by Federal enactment to pay assessments to any Depositors' Guaranty Fund of the Federal government, and thereby the deposits in National Banks in this State should be guaranteed by virtue of Federal laws, that the National Banks having availed themselves of the benefits of this Act, may withdraw therefrom and have returned to them ninety per cent of the unused portion of all assessments levied upon ad paid by said banks.

Section 3. An emergency for the preservation of the public peace, health, and safety is hereby declared to exist, and this Act shall take effect from and after its passage and approval.

Feb. 12, 1908.

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

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## No. 71.

---

NOBLE STATE BANK, PLAINTIFF IN ERROR,

vs.

C. N. HASKELL ET AL., DEFENDANTS IN ERROR.

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## MEMORANDUM OF AUTHORITIES CITED IN ARGUMENT.

---

CHAS. WEST,
*Attorney General of Oklahoma,*
*Attorney for Defendants in Error.*

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

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## No. 71.

---

NOBLE STATE BANK, PLAINTIFF IN ERROR,

*vs.*

C. N. HASKELL ET AL., DEFENDANTS IN ERROR.

---

## MEMORANDUM OF AUTHORITIES CITED IN ARGUMENT.

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The following authorities are to the effect that what at common law was a common right may be prohibited for the public good without violating due process of law.

The Oil Case—Ohio Oil Co. *vs.* Indiana, 177 U. S., 211.

The Sheep Case—Bacon *vs.* Walker, 204 U. S., 311.

The Bulk Sale Law Decisions, 211 U. S., 48; 217 U. S., 461.

The following cases hold that private property may be taken pursuant to a public demand for individual use without violating the Fourteenth Amendment.

The Ditch Case—Clark *vs.* Nash, 198 U. S., 369.

The Aerial Right-of-Way Case—Strickley *vs.* Highland Boy Co., 200 U. S., 531.

The Compulsory Sale of Minority Stock Case —Official *vs.* N. Y., N. H. & H. R. R., 203 U. S., 378.

A legislative instance is the tariff for revenue and protection of individual business.

The following groups of cases exemplify the public right to involuntary co-operation by owners of property:

The Dog Tax cases mentioned in my brief, p. 79 *et seq.*

The Quarantine Fees cases, p. 83, my brief.

The Public Utility Expense cases, my brief, p. 84.

The Firemen Fund cases, my brief, p. 89.

As to these cases, the Dog Tax cases are not overruled or impaired by Fox *vs.* Mohawk Soc., 51 L. R. A., 681, because in that case, at page 684 of the L. R. A., Judge Cullen said:

> "We think, however, that the statute is unconstitutional so far as it requires the owner of a dog to pay a license fee to the defendant (a society) for its own use."

In the Firemen Fund cases the question of the Fourteenth Amendment was squarely passed upon. In 21 Illinois, 511, it was said, "The power the legislature possesses of imposing burdens upon certain members of the community, who are supposed to be benefited by the efforts or acts of certain other members," is the power upon which the cases rest.

The diversion of such funds for upbuilding of efficient

fire service was held a public purpose and not violative of the Fourteenth Amendment.

93 N. Y., 313.

3 E. D. Smith, 440.

In Ætna Insurance Co. *vs.* Jones, 13 L. R. A., N. S., 1149, Chief Justice Pope states that the pivotal question is that the law is a taxing method which lacks uniformity. The same reason existed and was asserted as the ground upon which all the other Firemen Fund cases were decided adversely to the law. (See my brief, pp. 93 and 94.)

Legislative instances of involuntary co-operation in the creation of safety funds for mutual insurance of the profits, as shown in my brief, exist in the German, Indiana, New York, Ohio, and Iowa laws.

The creation of cash reserves is like in principle to the safety fund for deposits. With insurance companies a portion of these reserves are deposited with public officers. The Postal Savings Bank law is a legislative instance of the Government furnishing security for deposits (page 85 of my brief). The authority of this court was instanced to the effect that where the use of individuals and the public blend, the legislature shall determine where the cause shall rest.

Cooley *vs.* Port Wardens, 12 Howard, 289, cited to the effect that the pilots only were interested whether the fees went to them as individuals or to trustees for those among them most needing assistance.

It is for the depositors through the legislature to determine whether the safety fund shall be held by the State as trustee for those needing it.

Respectfully submitted.

CHAS. WEST,
*Attorney General of Oklahoma,*
*Attorney for Defendants in Error.*

IN THE

# Supreme Court

of the

# United States

Noble State Bank,
Plaintiff in Error,
vs.
C. N. Haskell, G. W. Bellamy, J. P. Connors, J. A. Menefee, M. E. Trapp and H. H. Smock,
Defendants in Error.

No. 71.

## PETITION FOR REHEARING.

C. B. AMES,
Attorney for Plaintiff in Error.

Warden Ptg. Co., Oklahoma City, Okla.

IN THE

# Supreme Court

## of the

# United States

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Noble State Bank,
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C. N. Haskell, G. W. Bellamy, J. P. Connors, J. A. Menefee, M. E. Trapp and H. H. Smock,
Defendants in Error.

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PETITION FOR REHEARING.*

I commence this petition with an apology and an explanation. The apology is for presuming to expect this Court to reconsider a conclusion reached by unanimous agreement.

*The opinion of the Court is attached at Appendix A.

The explanation is that the opinion does not carry conviction to my mind and the feeling that my duty is not discharged until I have exhausted the opportunities afforded me by the rules of the Court.

I respectfully suggest that the opinion is based on an erroneous assumption of fact and on a principle of law not supported by former decisions.

The erroneous assumption of fact is that the property taken by the law under consideration is "a comparatively insignificant" portion of the bank's capital.

The principle of law referred to is that a portion of the bank's property may "be taken without return to pay debts of a failing rival in business."

FIRST.

While it is true that the amount of the particular assessment involved in this case is small when considered alone, it is large when considered as a percentage of the bank's capital stock, amounting to 3 30-100 per cent.

Under the law as amended by the Act of 1909, annual emergency assessments of two per cent of the deposits are allowed and two per cent of the deposits may very frequently be twenty to thirty per cent of the capital stock.

The consolidated statement of the condition of all state banks in Oklahoma as of November 10, 1910, shows that their deposits aggregate $60,673,212.79. A two per cent assessment against the deposits therefore would amount to $1,213,464.25. The total capital and surplus of all state banks as shown by the same statement aggre-

gate $12,741,261.95, so that the emergency assessment which may be levied annually amounts to almost ten per cent of the entire capital and surplus of the banks.

If this law is valid, then, of course, similar laws might be passed applicable to all state and national banks. From the report of the Comptroller of the Currency for 1909 it appears on page 50 that the total deposits of all banks were $14,105,924,984.03. From page 45 of the same report it is seen that the total capital stock at the same time was $1,800,036,368.00. Two per cent of these deposits would be $282,118,499.68, which is more than fifteen per cent of the total capital stock.

Should it be suggested, however, that two per cent may never be levied, and that therefore these enormous figures are merely speculative, I would reply that the law permits the levy, requires it, if needed, and that these amounts can be taken if the law is valid. I would further reply that the legislature thinks the assessment may be necessary, because, otherwise it would not authorize it. Nay, more, the legislature thinks it may be not adequate, as shown by the provision of the law authorizing certificates to be issued for the deficit remaining after the assessment is exhausted.

I would further reply that immediately after this law was passed a levy of one per cent was made and that this levy if applied to all banks would yield $141,109,299.84, or nearly eight per cent of their entire capital.

A law which does take eight per cent of the aggregate capital of all the banks as a preliminary step to-

wards creating a guaranty fund, which authorizes an annual taking thereafter of fifteen per cent, which, when reduced to aggregates, mounts up into the hundreds of millions of dollars, it does not seem to me, can be justified as the taking of a comparatively insignificant portion of the bank's property.

If, however, as suggested in the opinion, the bank may retain a reversionary interest in the unused portion of the fund, then I call attention to the last message of Governor Haskell transmitted to the legislature on January 7, 1911, showing the total net collections of the guaranty fund up to December 31, 1910, were $818,740.65, while the total cash in the fund on that day was $73,-626.59, thus showing a loss to the banks of Oklahoma in a little less than three years of $745,115.06, or an average of about $250,000 a year, which is an average loss of approximately two per cent per annum on the entire capital and surplus as of November 10, 1910. The capital and surplus of these banks on February 8, 1908, as shown by the Bank Commissioner's consolidated statement, amounted to only $6,814,108.76, and if the loss be apportioned according to the average capital it would exceed two and one-half per cent per annum.

But this law not only takes from the banks this enormous sum of money, but it takes from the banker the value of his reputation and reduces all bankers, good, bad and indifferent, to the same level. One may have spent his life in the honorable, successful and conservative management of a bank, so that his name has become

the equivalent of safety; another may have never had any experience as a banker and his reputation in some other line of business may be justly bad, yet when he starts a bank, by this law, his depositors are made as safe as those of the good banker's, not because he is safe, but because the good banker is made liable for his debts.

A few days ago, in New York, several banks were involved and their depositors were participating in a "run." For the relief of this situation, a distinguished banker of that city announced that he had assumed liability for these deposits, and the run stopped, because the depositors had faith in this man. The effect of this law is to take away from that man the value of his reputation and to make all bankers just as safe as he; even more, the effect of this law is to compel Mr. Morgan to come to the rescue of every incompetent banker in the United States, whether he be in New York city or in the remotest portion of our possessions. Before Mr. Morgan came to the rescue of the New York situation, he doubtless investigated the securities and satisfied himself that there would be either no loss or only such a loss as he would be willing to assume. Under this law no such discretion would be vested in him, but he would be bound to come to the rescue regardless of the value of the securities and regardless of the amount of his loss.

Upon this subject Mr. Taft in his response to the notification speech at Cincinnati on July 28, 1908, said:

"The proposition is to tax the honest and prudent banker to make up for the dishonesty and imprudence of others. No one can foresee the burden which under

this system would be imposed upon the sound and conservative bankers of the country by this obligation to make good the losses caused by the reckless, speculative and dishonest men who would be enabled to secure deposits under such a system on the faith of the proposed insurance."

These words are in direct harmony with the facts shown by the governor of Oklahoma's last report—a loss of $745,000 between February 8, 1908, and December 31, 1910, during a time when there has been no financial disturbance and when general commercial conditions are known to have been exceedingly prosperous. Such a law may make the speculator's debts good, but they do not make the speculator safe. He secures deposits because the good bankers are compelled to back him. He fails because he is still an unsound banker and leaves the loss to be borne by those who do not speculate, and who merely have the privilege of paying without being able to control the speculation or share in the profits if it is successful.

The fact that the average annual losses of our national banks has been only a small per cent of their deposits is no argument that the same condition would prevail under a guarantee law. Such an argument leaves out of consideration the fundamental objection to the law. A banker's ability to secure deposits, without a guarantee, depends on his reputation for conservatism, safety, and successful experience. Deposits secured in this way are surrounded by the safeguard of business capacity, and, naturally, the percentage of loss is small.

Under the guarantee system, the depositor does not need to inquire into the banker's experience, record, or capacity. If the banker lacks these things, those bankers who possess them are compelled to sustain him with their strength. If the banker possesses them, they do not make him stronger than his feeble brother, because the law takes his strength to mingle with his brother's weakness, and thus insures a dead level of mediocrity. Under these conditions the depositor does not need to discriminate between bankers, and therefore chooses the one whom he likes the best, or who will pay the largest rate of interest, or offer the largest line of credit, or some other inducement which the experienced banker can not approve. It is literally true, therefore, as Mr. Taft said, that "The proposition is to tax the honest and prudent banker to make up for the dishonesty and imprudence of others." Such a condition naturally increases the percentage of loss. We learn from page 34 of the Attorney-General's brief that the average annual loss to depositors of all national banks is $71,704.00. The average capital stock (excluding surplus) of the national banks during the same period is not far from $650,000,000. (Comptroller's report for 1909, pp. 364-395.) The annual percentage of loss is therefore approximately eleven-hundredths of one per cent. As previously stated, the average annual loss of the state banks in Oklahoma during the existence of this law, is $248,372.02. Their average capital stock (excluding surplus) during the same period is approximately $10,000,000.00. (Bank Commissioner's consoli-

dated statement.) The annual percentage of loss is, therefore, approximately two and one-half per cent—11-100 of one per cent for the banks not guaranteed; two and one-half per cent for the guaranteed banks. The average loss in guaranteed banks, 2300 per cent greater than in banks not guaranteed.

While these figures are very startling, they illustrate the consequence of legislation compelling an artificial equality of men and an unnatural community of interests.

I attach hereto as "Appendix B," extracts from addresses delivered by Mr. J. W. McNeal before the American Bankers' Association in September, 1908, and by Mr. Daniel W. Hogan before the Nebraska State Bankers' Association during the same month. They illustrate the effect of this law.

SECOND.

It seems to me that the conclusion of law announced by the Court that a portion of the bank's property may "be taken without return to pay debts of a failing rival in business" is unsupported by authority.

In this connection the Court say:

"In the first place it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. *Clark vs. Nash*, 198 U. S., 361; *Strickley vs. Highland Boy Mining Co.*, 200 U. S., 527, 531; *Offield vs. New York, New Haven and*

*Hartford R. R. Co.*, 203 U. S., 372; *Bacon vs. Walker*, 204 U. S. 311, 315."

We respectfully submit that the basis of each of the cases cited was that the property was taken for a public use.

In the opinion of the Court by Mr. Justice Peckham, in *Clark vs. Nash*, it is said:

"But we do not desire to be understood by this decision as approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the state. We simply say that in this particular case, and upon the facts stated in the findings of the Court, and having reference to the conditions already stated, *we are of the opinion that the use is a public one*, although the taking of the right of way is for the purpose simply of thereby obtaining the water for an individual, where it is absolutely necessary to enable him to make any use whatever of his land, and which will be valuable and fertile only if water can be obtained. Other land-owners adjoining the defendant in error, if any there are, might share in the use of the water by themselves taking the same proceedings to obtain it, and we do not think it necessary, in order to hold the use to be a public one, that all should join in the same proceeding, or that a company should be formed to obtain the water which the individual land-owner might then obtain his portion of from the company by paying the agreed price, or the price fixed by law."

In *Strickley vs. Highland Boy Mining Co.*, the Court was construing a Utah statute which provided that

"The right of eminent domain may be exercised in behalf of the following *public* uses: * * * (6) Roads, railroads, tramways, tunnels, ditches, flumes, pipes, and dumping places to facilitate the milling, smelting or other reduction of ores, or the working of mines."

In delivering the opinion Mr. Justice Holmes says:

"This is a proceeding begun by the defendant in error, a mining corporation, to condemn a right of way for an aerial bucket line across a placer mining claim of the plaintiffs in error. The mining corporation owns mines high up in Bingham Canyon, in West Mountain mining district, Salt Lake county, Utah, and is using the line or way to carry ores, etc., for itself and others from the mines, in suspended buckets, down to the railway station two miles distant, and 1200 feet below."

The question before the Court was whether such a right of way under the statute of Utah declaring it to be a public use, could be procured as a public use or, whether it was an effort to condemn the property for private use, and the Court said:

"The question thus narrowed, is pretty nearly answered by the recent decision in *Clark vs. Nash*, 198 U. S., 361; 49 L. Ed., 1085; 25 Sup. Ct. Rep., 676. That case established the constitutionality of the Utah statute, so far as it permitted the condemnation of land for the irrigation of other land belonging to a private person, in pursuance of the declared policy of the state. In discussing what constitutes a public use, it recognized the inadequacy of use by the general public as a universal test. While emphasizing the great caution necessary to be shown, it proved that there might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation, which, under other circumstances, would be left wholly to voluntary consent. In such unusual cases there is nothing in the Fourteenth Amendement which prevents a state from requiring such concessions. If the state Constitution restricts the legislature within narrower bounds, that is a local affair, and must be left where the state court leaves it in a case like the one at bar. In the opinion of the legislature and the supreme court of Utah the public welfare of that state demands that aerial lines

between the mines upon its mountain sides and the railways in the valleys below should not be made impossible by the refusal of a private owner to sell the right to cross his land. The Constitution of the United States does not require us to say that they are wrong. If, as seems to be assumed in the brief for the defendant in error, the finding that the plaintiff is a carrier for itself and others means that the line is dedicated to carrying for whatever portion of the public may desire to use it, the foundation of the argument on the other side disappears."

In *Offield vs. New York, New Haven, etc., R. R. Co.*, the Court was construing a Connecticut statute authorizing a railroad company under certain circumstances to acquire by condemnation, outstanding shares of stock "upon a finding by a judge of the superior court that such purchase will be for the public interest."

The Court held that the taking was for a public use and that the power here exercised was less broad than that exercised in the two preceding cases, as appears from the following quotation from the opinion by Mr. Justice McKenna:

"(1) *The power of the state to declare uses of property to be public has lately been decided in Clark vs. Nash*, 198 U. S., 361; 49 L. Ed., 1085; 25 Sup. Ct. Rep., 676, and in the case of *Strickley vs. Highland Boy Gold Mining Co.*, 200 U. S. 527; 50 L. Ed., 581; 26 Sup. Ct. Rep., 301. These cases exhibit more striking examples of the power of a state than the case at bar. In the first case, the statute of a state permitted an individual to enlarge the ditch of another to obtain water for his own land; in the second case, the statute authorized the condemnation of a right of way to transport ore from a mine to a railroad station. In the first case it was said that the public policy of the state, declaring the character of use of property, depends upon

the facts surrounding the subject. In the second case it was said, commenting on the first, 'it proved that there might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation, which, under other circumstances, would be left wholly to voluntary consent.' The case at bar does not need the support of such broad principles. The ultimate purpose of defendant in error in the case at bar is the improvement of the New Haven and Derby Railroad, which 'connects (we quote from the opinion of the Supreme Court of Errors, 77 Conn., 419; 59 Atl., 511), at New Haven, on the east, with four, and at its western terminals with two, important railroad lines owned by the plaintiff (defendant in error), and forms a link in an all-rail route between Boston and the West, which is the only one controlled by the plaintiff, and the only one of any kind controlled by it over which goods can be transported with assured despatch in all weathers and at all seasons.' In this purpose the public has an interest, and to accomplish it the Court applied the statute. The Court observed: 'To develop this route so as best to serve the public interest requires the laying of additional tracks on the New Haven and Derby Railroad and other extensive and very costly improvements. The lessor company has neither means nor credit whereby this can be effected on advantageous terms. The plaintiff could and will effect it, and at much less cost, if it can acquire the two outstanding shares of the stock of the lessee. They are owned by the defendant, who refuses to agree on terms of purchase.' "

In *Bacon vs. Walker,* the Court was considering an Idaho statute prohibiting the herding of sheep on the public lands within two miles of dwelling houses; the statute having been construed by the supreme court of Idaho as not intended to prevent owners from grazing their sheep upon their own lands, although situated within two miles

of the dwelling of another.

The reasons underlying this statute, as shown by Mr. Justice McKenna, in delivering the opinion of this Court, are set forth in *Sweet vs. Valentine*, 8 Idaho 431; 69 Pac., 995, and from an examination of that opinion we find that herds of sheep destroy the range and that if they are permitted to come around the small settlements of the isolated valleys they destroy the vegetation necessary for domestic animals; that the cattle industry had already largely been destroyed by the encroachment of sheep; that the smell of sheep is offensive to many persons, and that when herded in large bands they constitute a nuisance under the Idaho statute, and that for these reasons they could be prohibited from the public lands in the state.

From that opinion the Court quotes with apparent approval the following reasons justifying that statute:

"It is a matter of public history in this state that conflicts between sheep owners and cattle men and settlers were of frequent occurrence, resulting in violent breaches of the peace. It is also a matter of public history of the state that sheep are not only able to hold their own on the public ranges with other live stock, but will in the end drive other stock off the range, and that the herding of sheep upon certain territory is an appropriation of it almost as fully as if it was actually inclosed by fences, and this is especially true with reference to cattle. The legislature did not deem it necessary to prohibit the running at large of sheep altogether, recognizing the fact that there are in the state large areas of land uninhabited, where sheep can range without interfering with the health or subsistence of settlers or interrupting the public peace. The fact was also recognized by the legislature that, in order to make the settlement of our small isolated valleys possible, it was neces-

sary to provide some protection to the settler against the innumerable bands of sheep grazing in this state."

There are statutes in probably all the states of the Union relating to live stock running at large, and it is observed from the passage just quoted that the supreme court of Idaho, as well as the supreme court of the United States regarded this legislation as apparently of the same class. The legislature did not deem it necessary to prohibit all live stock from running at large, but thought the public welfare was protected by applying the prohibition to sheep only. The greater power having been uniformly exercised for generations, the lesser is certainly included.

It is of course apparent that there was no taking of the plaintiff's property in that case, much less was there a taking for private use.

In Appendix "C," we have collected a large number of decisions by this court and by the courts of many states in the Union showing that private property cannot be taken for private use and that when it is taken for public use that it cannot be taken without compensation.

It is equally well settled that when it is taken for public use that the compensation must be in money, and not in some so-called general benefit.

2 *Lewis on Eminent Domain*, 3rd Ed., Sections 502-505.

In the opinion at bar, Mr. Justice Holmes proceeds:

"It would seem that there may be other cases beside the every day one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is

compelled to assume. See *Ohio Oil Co. vs. Indiana*, 177 U. S. 190."

That was a case in which a statute of Indiana was sustained which prohibited a person from discharging into the air the out put of a natural gas well. The reasoning placed the decision on two grounds: First, that natural gas, while a commodity, was not the subject of private ownership until reduced to possession; and, second, that a gas well tapped a basin underlying the land of many owners and that no owner had the right to waste it by an unnecessary discharge into the air, because the effect of his doing so was to take and waste the common reservoir.

The decision in no way limited the right of the owner to take for use, but only denied his right to allow a useless waste.

It is therefore apparent that the decision did not involve the taking of private property much less a taking for private use.

The opinion then proceeds:

"It may be said in a general way that the police power extends to all the great public needs. *Camfield vs. United States*, 167 U. S., 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

The Camfield case sustained a statute prohibiting private individuals from enclosing the public domain, but as we read the opinion it does not lay down a rule so broad as that just quoted.

We respectfully, but earnestly, urge that if the police

power may be exercised in aid of what the prevailing morality or strong and preponderant opinion regard as necessary to the public welfare, that the constitution of the United States is repealed and that there is no power to declare any act of the legislature invalid if it is an exercise of the police power.

How can the prevailing morality or preponderant opinion of the people be ascertained? By the acts of the legislature.

When do the people regard any such act as immediately necessary to the public walfare Manifestly when they pass the act; and, to make it stronger, an emergency clause may be attached by the legislature as provided by the constitution of this state.

Under our constitution, Article 5, Section 58, Snyder's Edition, page 181:

"No act shall take effect until ninety days after the adjournment of the session at which it was passed except enactments for carrying into effect provisions relating to the initiative and referendum, or a general appropriation bill, unless, in case of emergency, to be expressed in the act, the Legislature, by a vote of two-thirds of all members elected to each House so directs. An emergency measure shall include only such measures as are immediately necessary for the preservation of the public peace, health, or safety * * *"

Our court has held that the legislature is the exclusive judge of the existence of an emergency and that when one is declared, it is binding on the courts.

*Oklahoma City vs. Shields*, 22 Okla., 265; 100 Pac., 559.

*In Re Menefee*, 22 Okla., 365; 97 Pac., 1014.

It is therefore true that the legislature is the exclusive judge of that which is immediately necessary to the public welfare and that its expression of opinion is binding upon the courts as to what is the prevailing morality or strong and preponderant opinion of the times.

It seems to me that the doctrine laid down in the opinion substitutes public opinion for the constitution. Public opinion can only be ascertained from the will of the people as declared by the legislature, and, therefore, the decision substitutes the act of the legislature for the constitution.

In this connection I quote the following words from the dissenting opinion of the late Mr. Justice Brewer, in *Chicago, Burlington and Quincy R. R. Co. vs. Illinois,* 200 U. S., 341:

"It seems to me the police power has become the refuge of every grievous wrong upon private property. Whenever any unjust burden is cast upon the owner of private property which cannot be supported under the power of eminent domain or that of taxation, it is referred to the police power. But no exercise of the police power can disregard the constitutional guaranties in respect to the taking of private property, due process and equal protection, nor should it override the demands of natural justice."

The Court then proceeds:

"Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If then the legislature of the state thinks that the public welfare requires the measure under consid-

eration, analogy and principle are in favor of the power to enact it."

I have lived under the shadow of the guaranty law for three years and have heard hundreds of arguments concerning its purposes, its merits and its demerits, but this is the first time I have heard the argument that its design is to insure "the possibility of payment by checks drawn against bank deposits." I respectfully submit that this idea has not prevailed in Oklahoma, and that the law does not, and is not designed to, accomplish that end.

There are probably ten thousand checks worthless because their makers are bad, where there is one because of a bank failure.

A more direct and certain way of making checks a safe means of payment would be to impose a tax of a few cents upon each check to create a guaranty fund for the purpose of paying bad checks. The issue and circulation of checks is certainly one of "the primary conditions of successful commerce." The means employed would certainly have a reasonable tendency to accomplish the end sought. An emergency act of the legislature would be conclusive evidence that "the prevailing morality" and strong and preponderant opinion regarded the measure as "greatly and immediately necessary to the public welfare." A two-cent tax on checks has been heretofore imposed by Congress and is valid beyond doubt when used for public revenue.

The legal objection to such a law would be that it takes private property for private use. The practical objection would be that it discourages careful scrutiny in taking

checks; and encourages reckless and incompetent business. The issuance of checks might be safeguarded by imposing criminal punishment, so that a man's business honor, financial resources and liberty would all be jeopardized by the issue of a bad check.

This is almost a counterpart of the law under consideration.

If such an imposition be regarded as a tax it is clearly unconstitutional, under the authority of *Loan Association vs. Topeka*, 20 Wall, 626, the other cases cited in my original brief, and the opinion in this case itself.

If, however, it should be called an exercise of the police power, under the opinion in this case, it would be valid.

Is it possible that an unconstitutional law may be made constitutional by the simple device of changing its classification?

The Court next say:

"The power to restrict liberty by fixing a minimum of capital required of those who would engage in banking is not denied. The power to restrict investments to securities regarded as relatively safe seems equally plain. It has been held, we do not doubt rightly, that inspections may be required and the cost thrown on the bank."

We respectfully suggest that neither one of these requirements takes private property for private use, and therefore they do not throw any light upon the question involved in the case. Limiting the amount of capital is purely a regulation of the business, regulating the class of investments is purely a regulation of the business, neither one

takes the property of the bank away from it, but both leave it in exclusive possession of its own.

Putting the cost of an examination upon the bank does not take its property for a private use because the fee charged goes to the public officers of the state and is for a public use. These fees instead of being paid by the banks might be paid out of the general revenue fund of the state. This demonstrates that it is not a private use because the Court in this opinion concedes that money raised by taxation cannot be devoted to a private use no matter how indirectly beneficial to the public it may be:

The Court next say:

"The power to compel, beforehand, co-operation, and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized if government is to do its proper work, unless we can say that the means have no reasonable relation to the end. *Gundling vs. Chicago*, 177 U. S., 187, 188. So far is that from being the case that the device is a familiar one. It was adopted by some states the better part of a century ago, and seems never to have been questioned until now. *Receiver of Danby Bank vs. State Treasurer*, 39 Vt., 92; *People vs. Walker*, 17 N. Y., 502. Recent cases going not less far are *Lemieux vs. Young*, 211 U. S., 489; *Kidd, Dater and Price Co. vs. Musselman Grocer Co.*, 217 U. S., 461."

So far as I recall the cases, the only method by which the state could heretofore take *money* from its citizens was by taxation, and the Court in this case concede that money could not be raised for this purpose by taxation. Indeed the previous decisions of this Court and the numerous decisions of other courts, cited in our original brief, clearly demonstrate that position.

We, therefore, have a case in which the state cannot, by taxation, compel beforehand, the co-operation of all its people, because it would be the taking of private property for private use, and yet the state can accomplish the same result by levying a charge upon a portion of its people and calling it an exercise of the police power, instead of taxation.

The fact that similar laws were in force in two states seventy years ago and that their validity was not questioned is weaker argument than confronted Chief Justice Marshall in writing the opinion in *Gibbons vs. Ogden*, because that decision overturned a practice which had been uniform for thirty-five years and which was then in general force in the Atlantic states. Yet, we will all admit that if the court had then yielded to that argument, that our country would not have existed as it does to-day.

It is further fundamental that a decision is not authority on a proposition not in any wise considered by the court, and in the Vermont and New York cases, the validity of the laws was not questioned or decided.

*Pollock's Expansion of the Common Law*, page 52 et seq.

I recognize the wide sweep and great elasticity of the police power and yet it seems to me that it and every power of the state must stop short of taking one man's private property for the private use of another.

It would probably be a good thing for a large portion of the people if all of the property of all of the people could be divided equally, and it is a conceivable

thing that the "prevailing morality" of some future time may regard the abolition of private ownership as "immediately necessary to the public welfare" and that this prevailing morality may be backed by a strong preponderant public opinion, resulting in legislation to that effect.

This court would say that such legislation was unconstitutional because it would be a taking of private property for private use and yet I respectfully suggest that there is no difference of principle involved in the two cases.

The cases of *Lemieux vs. Young and Kidd, Dater and Price vs. Musselman Grocer Co.* sustain what is known as the bulk sales laws by which merchants are prohibited from selling their stock in bulk until after notice to their creditors, but these cases are merely, as I understand them, extensions of the statutes of frauds, and do not in any way take private property for any kind of use, either public or private. They are merely regulations of a use to prevent dishonest practices.

We further respectfully suggest that this opinion is in direct conflict with the entire range of decisions holding that state action imposing a railroad rate too low to furnish an adequate return on the investment is unconstitutional as a taking of private property for private use.

*Munn vs. Illinois*, 94 U. S., 113, laid down the rule that the legislature had the right to regulate and in regulating had a right to fix the rates and that, as the right to regulate existed, the court would not interfere with the legislative rate, but no sooner had this rule been announced than the court commenced restricting it and finally

overruled it bodily because the effect of it was to take private property for private use.

There is a twilight zone separating public use from private use and within this zone the line of division is irregular and here it is that the courts differ from each other in the application of the principle, but the difficulty heretofore has been in determining whether the use was public or private. There has never heretofore been a decision (unless it be *Munn vs. Illinois*) that permits private property to be taken for private use. Where the question involved was a narrow one and presented doubt, the doubt has been solved by declaring the use to be public as was done by this court in *Clark vs. Nash, Strickley vs. Highland Boy Mining Co.* and *Offield vs. New York, New Haven, etc., R. R. Co.*

But when it has once been determined that the property is being taken for a private use that has heretofore been regarded as the complete settlement of the controversy.

In *Louisville and Nashville R. R. Co. vs. Central Stock Yards Co.*, 212 U. S., 132; 29 Sup. Ct. Rep., 246, and in *Mo. Pacific R. R. Co. vs. Nebraska*, 217 U. S. 196; 30 Sup. Ct. Rep. 461, where both of the opinions were delivered by Mr. Justice Holmes, we respectfully suggest that a diametrically opposite doctrine is laid down to the one of the case at bar, and in both of those cases legislative acts were declared unconstitutional as the taking of property without due process of law.

I do not wish to burden the Court with a discussion of the last ground of the opinion unless a rehearing is grant-

ed, further than to say that it may be conceded that banking may be confined to corporations without holding that private property may be taken for private use, but as the Court treats this question as incidental, I shall not discuss it unless this petition is granted.

I conclude this petition with a quotation from the first dissenting opinion written by the present Chief Justice, then Mr. Justice White, in *Pollock vs. Farmers Loan and Trust Co.*, 157 U. S. 429; 15 Sup. Ct. Rep., 673, 716:

"My inability to agree with the court in the conclusions which it has just expressed causes me much regret. Great as is my respect for any view by it announced, I cannot resist the conviction that its opinion and decree in this case virtually annul its previous decisions in regard to the powers of congress on the subject of taxation, and are therefore fraught with danger to the court, to each and every citizen, and to the republic. The conservation and orderly development of our institutions rest on our acceptance of the results of the past, and their use as lights to guide our steps in the future. Teach the lesson that settled principles may be overthrown at any time, and confusion and turmoil must ultimately result. In the discharge of its functions of interpreting the constitution this court exercises an august power. It sits removed from the contentions of political parties and the animosities of factions. It seems to me that the accomplishment of its lofty mission can only be secured by the stability of its teachings and the sanctity which surrounds them. If the permanency of its conclusions is to depend upon the personal opinions of those who from time to time may make up its membership, it will inevitably become a theatre of political strife, and its action will be without coherence or consistency."

And again he says:

"The fundamental conception of a judicial body is

that of one hedged about by precedents which are binding on the court without regard to the personality of its members. Break down this belief in judicial continuity, and let it be felt that on great constitutional questions this court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our constitution will, in my judgment, be bereft of value, and become a most dangerous instrument to the rights and liberties of the people."

For the reasons herein set forth, the plaintiff in error respectfully prays the court to grant a re-hearing and a re-argument of said cause, and in the meantime to stay the mandate until the further order of the Court.

C. B. AMES,

Attorney for Plaintiff in Error.

I hereby certify that in my opinion the reasons assigned for a re-hearing in the foregoing petition are sound in law, that in my opinion the re-hearing should be granted, and that this petition is not filed for delay.

C. B. AMES.

## "APPENDIX A."

Mr. Justice Holmes delivered the opinion of the Court.

This is a proceeding against the Governor of the State of Oklahoma and other officials who constitute the State Banking Board, to prevent them from levying and collecting an assessment from the plaintiff under an act approved December 17, 1907. This act creates the Board and directs it to levy upon every bank existing under the laws of the State an assessment of one per cent of the bank's average daily deposits, with certain deductions, for the purpose of creating a Depositor's Guaranty Fund. There as provisos for keeping up the fund, and by an act passed March 11, 1909, since the suit was begun, the assessment is to be five

per cent. The purpose of the fund is shown by its name. It is to secure the full repayment of deposits. When a bank becames insolvent and goes into the hands of the Bank Commissioner, if its cash immediately available is not enough to pay depositors in full, the Banking Board is to draw from the Depositors' Guaranty Fund (and from additional assessments if required) the amount needed to make up the deficiency. A lien is reserved upon the assets of the failing bank to make good the sum thus taken from the fund. The plaintiff says that it is solvent and does not want the help of the Guaranty Fund, and that it cannot be called upon to contribute toward securing or paying the depositors in other banks consistently with Article I, section 10, and the Fourteenth Amendment of the Constitution of the United States. The petition was dismissed on demurrer by the Supreme Court of the State. 22 Okla., 48.

The reference to Article I, section 10, does not strengthen the plaintiff's bill. The only contract that it relies upon is its charter. That is subject to alteration or repeal, as usual, so that the obligation hardly could be said to be impaired by the act of 1907 before us, unless that statute deprives the plaintiff of liberty or property without due process of law. See *Sherman vs. Smith*, 1 Black, 587. Whether it does so or not is the only question in the case.

In answering that question we must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the Court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few scientfically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the States is limited by the Constitution of the United States, judges should be slow to read into the latter *nolumus mutare* as against the law-making power.

The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation. And while we should assume that the plaintiff would retain a reversionary interest in its contribution to the fund so as to be entitled to a return of what remained of it if the purpose were given up, (see *Receiver of Danby Bank vs. State Treasurer*, 39 Vt., 92, 98,) still there is no

denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first place it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. *Clark v. Nash*, 198 U. S., 361. *Strickley v. Highland Boy Mining Co.*, 200 U. S., 527, 531. *Offield v. New York, New Haven and Hartford R. R. Co.*, 203 U. S., 372. *Bacon v. Walker*, 204 U. S., 311, 315. And in the next, it would seem that there may be other cases beside the every day one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume. See *Ohio Oil Co. v. Indiana*, 177 U. S., 190. At least, if we have a case within the reasonable exercise of the police power as above explained, no more need be said.

It may be said in a general way that the police power extends to all the great public needs. *Camfield vs. United States*, 167 U. S., 518. It may be put forth in aid of what is sanctioned by usage, or held by the *prevailing* morality or strong *and* preponderant opinion *to be greatly and immediately* necessary to the *public* welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If then the legislature of the State thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it. Even the primary object of the required assessment is not a private benefit as it was in the cases above cited of a ditch for irrigation or a railway to a mine, but it is to make the currency of checks secure, and by the same stroke to make safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand. The priority of claim given to depositors is incidental to the same object and is justified in the same way. The power to restrict liberty by fixing a minimum of capital required of those who would engage in banking is not denied. The power to

restrict investments to securities regarded as relatively safe seems equally plain. It has been held, we do not doubt rightly, that inspections may be required and the cost thrown on the bank. See *Charlotte, Columbia and Augusta R. R. Co. v. Gibbes*, 142 U. S. 386. The power to compel, beforehand, co-operation, and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized, if government is to do its proper work, unless we can say that the means have no reasonable relation to the end. *Gundling v. Chicago*, 177 U. S., 183, 188. So far is that from being the case that the device is a familiar one. It was adopted by some States the better part of a century ago, and seems never to have been questioned until now. *Receiver of Danby Bank v. State Treasurer*, 39 Vermont, 92. *People v. Walker*, 17 N. Y., 502. Recent cases going not less for are *Lemieux v. Young*, 211 U. S., 489, 496. *Kidd, Dater and Price Co. v. Musselman Grocer Co.*, 217 U. S., 461.

It is asked whether the State could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arise. With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides. *Hudson County Water Co. v. McCarter*, 209 U. S., 349, 355. It will serve as a datum on this side, that in our opinion the statute before us is well within the State's constitutional power, while the use of the public credit on a large scale to help individuals in business has been held to be beyond the line. *Loan Association v. Topeka*, 20 Wall, 655. *Lowell v. Boston*, 111 Mass., 454.

The question that we have decided is not much helped by propounding the further one, whether the right to engage in banking is or can be made a franchise. But as the latter question has some bearing on the former and as it will have to be considered in the following cases, if not here, we will dispose of it now. It is not answered by citing authorities for the existence of the right at common law. There are many things that a man might do at common law that the States may forbid. He might embezzele until a statute cut down his liberty. We cannot say that the public interests to which we have adverted, and others, are not sufficient to warrant the State in taking the whole busi-

ness of banking under its control. On the contrary we are of opinion thet it may go on from regulation to prohibition except upon such conditions as it may prescribe. In short, when the Oklahoma legislature declares by implication that free banking is a public danger, and that incorporation, inspection and the above-described co-operation are necessary safeguards, this Court certainly cannot say that it is wrong. *North Dakota v. Woodmansee,* 1 North Dakota, 246. *Brady v. Mattern,* 125 Iowa, 158. *Weed v. Berga,* 141 Wis., 569. *Commonwealth v. Vrooman,* 164 Pa., 306. *Myers v. Irwin,* 2 S. and R., 368. *Meyers v. Manhattan Bank,* 20 Ohio, 283, 302. *Attorney General v. Utica Insurance Co.,* 2 Johns. Ch., 371, 377. Some further details might be mentioned, but we deem them unnecessary. Of course objections under the State constitution are not open here.

*Judgment affirmed.*

## "APPENDIX B."

(Address by Mr. J. W. McNeal, before the American Bankers' Association.)

At the meeting of the American Bankers' Association held in Denver, September 29th to October 1st, 1908, when the call of states was made for a report upon banking conditions, Mr. J. W. McNeal, President of the National Bank of Commerce, located at Guthrie, the Capital of the State, responded as follows:

*Mr. President and Gentlemen of the Conventions*

It is perhaps not improper that I should discuss the Oklahoma Guaranty Deposit Law, and, in what I shall say, I am expressing my individual opinion of this law.

To my mind it is the most vicious and pernicious law ever forced on a body of honorable men. It contains a provision for an unlimited mutual liability for all the defalcations, lack of judgment, dishonest and incompetent bankers, without any recognition of the time-tried, strong banker, who may have spent a life time in building up his reputation. Under the provisions of the law, the State Banking Board is required to levy an assessment equal to one per cent of the average deposits in each bank and, in the future, to levy as often as may be required, a sum suf-

ficient to maintain this fund, at one per cent of the average deposits of the state.

What have been some of the results of the actual operation of this law in Oklahoma? There have been seventy-seven new state bank charters issued since the adoption of this law, forty-two of these, with a capital stock of only $10,000 each. There has been a regular hegira for starting new state banks without regard to the necessities of the community or the character of the men starting the banks.

We have one instance of where a man failed in Kansas, undr his own name, then started up in business under his wife's name and failed, beating his creditors out of $70,000, not paying them a cent. Under the old territorial law, he attempted, under theguise of relatives to start a bank but in two years his business was so trifling that it forced him out of the business. He now has already started three banks in Oklahoma and boasts that he will start twelve more. Within sixty days from starting, one of his banks, I am informed, and his statement shows, that he had a deposit account of over $109,000. His cashier is under indictment for embezzlement. I hope and trust that he will be able to explain the matter without wrong to him. In only mention these facts to show that it is immaterial what character of men are at the head of the banks, they get the business by claiming that the state is guaranteeing them and it makes no difference whatever as to the character or personality of the officers. A man may bet all his money on the races, may gamble on the Board of Trade, may fight joint whiskey, may lead a licentious life and go out and solicit deposits, saying, "What do you care what kind of a lift I lead, the state is behind me?"

Two men recently started a bank of $25,000 capital, in Oklahoma City, a town of forty or fifty thousand inhabitants. When asked how they expected to succeed with a $25,000 bank in a city of that size, one of them replied, "What do we care about capital, the state is in partnership with us?" The president of the First National Bank of Perry was also a merchant and failed in business and was compelled to go through bankruptcy. Naturally, he had to resign his connection with the First National Bank. He now has taken out a charter and is president of a state bank in Oklahoma. One man, when prohibition closed up his

saloon, quit the saloon business and started up a bank and has thirty or forty thousand on deposit.

There can be but one deduction from this enormous rush for starting new state banks. They are being starttd by irresponsible, inexperienced men, and, instead of indicating a solid growth for the State of Oklahoma, they indicate an era of irresponsible and wild-cat work.

One of the dangerous evils of this Guaranty Law is that it guarantees credit deposits as well as cash deposits. Now, you all know that not more than one-tenth of a bank's daily deposits are in actual cash. Nine-tenths are credit deposits, are either checks and drafts or proceeds of loans. When these credit deposits, that are made as the proceeds of a loan, are guaranteed, the guaranty certainly reaches to the guaranteeing of the loan itself, for the reason that the deposit is merely the result of the loan.

I have heard it discussed and I think it feasible for a dishonest man or set of men to organize a $10,000 bank, then create a lot of fictitious deposits as the proceeds of a lot of dummy notes, then let the bank close its doors and call on the guarantee fund to pay these deposits. Naturally, the deposit will be credited to men in no way identified with the note itself.

We had one bank failure in my town for something like $1,000,000. This would have taken more than five per cent assessment on the deposits of the state banks of Oklahoma. Supposing a bank had $100,000 deposit on a capital stock of $10,000. Fifty per cent, or one-half of its capital stock, would be confiscated to make up the one loss. It is more dangerous to the honest small banker than to the large one, because the large one can prepare himself to weather the storm.

Under guise of this law an attempt is being made to put all banks on an exact equality. The man who has spent a lifetime in building up an honorable reputation is sacrificed for the sake of making some poor, incompetent, dishonest banker exactly equal to him. It is a mistake to suppose that sacrificing the assets of the solvent bank is going to prevent the rascal from failing. There is more money in it for him to fail, under this law, than there will be to run.

## ADDRESS BY DANIEL HOGAN.

At the Annual Convention of the Nebraska State

Bankers' Association, held at Lincoln on September 24th and 25 th, 1908, Mr. Daniel W. Hogan, Cashier of the American National Bank, of Oklahoma City, Oklahoma, made what he called "simply a shop talk" about conditions in Oklahoma. He said in part:

## GUARANTY LAW IS INCREASING NUMBER OF BANKS.

I am going to hold, gentlemen, that the guaranty law in Oklahoma is, First, increasing the number of banks beyond any reasonable calculation for a profitable investment; second, it lowers the standard of the bankers; third, that it lowers the capital employed in banking; fourth, that it encourages speculation; fifth, that it permits politicians to go into the banking business, and profit by their position on the Banking Board.

I hold in my hand a scrap book which contains clippings that I have taken from the daily papers in Oklahoma, and I want to read to you a few of those, because I think you would all be interested in them.

Upon the subject of "increasing the number of banks beyond any reasonable calculation for profitable investment," I want to read to you a clipping from the Oklahoman on September 9, which reads as follows: "Charters Issued. Guthrie, Okla., September 9. Charters were issued to the following banks by the Secretary of State today." The clipping then gives a list of five State banks, giving the name of the bank, the town, the capital and directors, but I will simply read to you the title and locations: The First State Bank of Durant, the First State Bank of Marlow, the Alva Security Bank of Alva, the Bank of Gage, the Farmers' State Bank of Cement, and the Flanigan Loan & Investment Company of El Reno, and that wasn't a very good day for banks either, in Oklahoma—five in a day.

Mr. A. C. Shallenberger—Were they all new banks?

Mr. Hogan—All new banks.

Mr. Shallenberger—Will you give the size of the towns and how many banks in each?

Mr. Hogan—I have here a letter from Mr. H. H. Smock, the bank examiner of Oklahoma, which reads as follows:

"Guthrie, September 19, 1908.

"Mr. D. W. Hogan, Oklahoma City, Okla.

"APPENDIX B."

"Dear Sir—I herewith enclose list of banks which have been authorized by this department to open for business from January 1 to this day. The list includes new banks, reorganizations and conversions. The majority of the reorganizations were formerly private banks in Indian Territory. I shall be glad to furnish you any additional information desired.

"Yours very truly,
"H. H. SMOCK, Bank Examiner."

The list he enclosed shows forty-seven new banks, and twelve banks which had been converted from National to State banks, and two banks which had been succeeded by two others. I will not read the list as it would take some time, but if anybody wishes to see it, they may. You will note, gentlemen, that this list does not show a single National bank organized from January 1 up to the present time, but does show forty-seven new State banks, and mark you, gentlemen, that several months of that period was during and shortly after the panic. The real beginning of the taking out of charters for State banks in Oklahoma has just begun. Is there a banker present who will not say that in a new State like Oklahoma, right after a panic, that forty-seven new banks is an excessive number, and if you say it is not, I will prove it to you a little later.

Mr. Shallenberger—How many old National banks surrendered their charters during the time mentioned?

NATIONAL BANKS THAT HAVE SURRENDERED CHARTERS.

Mr. Hogan—Twelve National banks surrendered their charters.

Mr. Shallenberger—Were the twelve included in the number?

Mr. Hogan—No, they were not included. There were forty-seven new banks organized.

Mr. Levi Kimball—What is the average capital of those forty-seven banks?

Mr. Hogan—This statement does not give the capital, but I judge it would average about $15,000. They put the capital as low as the town will admit, in all cases. What is the use of large capital under this law?

Now, gentlemen, I want to make this statement to you, and will then read you the facts as they exist in Oklahoma.

## "APPENDIX B."

I was in Bank Commissioner Smock's office last Friday. Mr. Smock is a good bank commissioner. He had before him the application of a man whom he knew had failed twice, once in his wife's name and once in his own. The failure occurred in a sister State—Kansas. I can give the man's name and the name of the towns, but it not necessary. The Bank Commissioner had written to a banker at a small town east of Oklahoma City whom he knew quite well, and asked for information, which was refused. He then appealed to the commercial agencies and failed to get a reply. Knowing that the party was going to start a bank, I had previously written to a commercial agency and asked for a report. They would not mail the report to me, but they telephoned me that if I would come over, they would show it to me, and I went. That report was not flattering, or encouraging by any neams, but the Bank Commissioner could not turn him down. He felt and knew that it was wrong to grant that man a charter, but he had nothing substantial on which to base his refusal. The charter was granted.

At Prague, Okla., a town of 998 people, an application was made to start a fourth bank (laughter), 249 people to the bank. The Bank Commissioner said, "No, we will not tolerate this at all, there are too many banks in Prague." The aplicants appealed it to the courts, and this is the decision which I have clipped from a newspaper, and which reads as follows:

"Guthire, Okla., September 5, Judge A. H. Houston, in the District Court this afternoon, handed down an opinion to the effect that the Banking Board had no right to refuse a charter to applicants for a State bank, as was done in the case of Hinton and Prague last week. He stated that in his opinion, that the fact that the other banks of the town objected, or that an objection was raised on the ground that the applicant was inexperienced in banking business was not a matter for the board to consider, but that they were compelled under the law to grant a right and issue a charter to any corporation seeking one as long as the papers were properly executed."

I think this clearly shows that the tendency of the guaranty law is to increase the number of banks far beyond the requirement of the town, and beyond the number that would produce a profit to the stockholders.

## "APPENDIX B"

## AS TO LOWERING STANDARD OF THE BANKER.

In reference to lowering the standard of the banker, I think here is one of the most important propositions that we have mentioned. I do not care to discuss the theory of it, as it has been well thrashed out, I want to read to you a clipping. I will omit the names, as I do not care to give the names of the parties; however, I do not know why a man should not read a newspaper clipping. It is as follows:

"To incorporate many new banks." This was published in the Oklahoman, our leading Democratic paper, under date of August 4: "Oklahoma would extend depositors guaranty law over Kansas Bank. C. F. Elerick, president of the First State Bank, announced yesterday that he soon will incorporate no less than fifteen banks in Oklahoma and Kansas. 'They will all be State banks,' said Mr. Elerick, yesterday, 'and will probably be located in the following cities: Newkirk, Nowata, Bartlesville, Ardmore, Tulsa, Elk City, Blackwell, Enid, Guthrie, El Reno, Chickasha, McAlester, Vinita, Paul's Valley, Lawton and Parsons, Kan.' A novel feature of the Kansas bank will be the fact that the Oklahoma depositors guaranty law probably will be sought to cover its operation. Mr. Elerick, who is a stout believer in the efficiency of that law, maintains that depositors should have all protection possible. The bank, however, will be incorporated under the bankng laws of Kansas, and the Oklahoma idea will be one of its added features."

Mr. S. S. Burnham—How much interest do they pay down there?

Mr. Hogan—I will come to that pretty soon. Under the head of encouraging speculation in banks, and to answer the question the gentleman asks about the rate of interest, I will read another clipping. This is not very long, and I hope you will bear with me for a monent. From the Cherokee Republican of Sallisaw, "Special Inducement." "The Sallisaw Bank & Trust Company is making a special offer to certain kinds of depositors, of school funds, church funds, township funds and secret order funds, deposited with this company will draw 8 per cent interest. This offer is made only to the above named depositors, and is not for the purpose of increasing the funds of the institution offering it, but to assist the concerns making such deposit. All depositors placing money with the Sallisaw Bank & Trust

Company are insured by special State guaranty fund."

The moment I saw this article, I thought that it would be a good thing to send to Mr. Smock, the Commissioner, and he undoubtedly received it, as you will see from the article that appeared in the next week's paper. If any of you doubt this, write to the paper named for yourself. The article I refer to is as follows:

"Special to Public Institutions." (That is the heading and appears on the first page of the paper.) "The Sallisaw Bank & Trust Company offered in last week's papers to pay 8 per cent interest on money deposited by public institutions, such as churches, secret societies and school funds.

"I received a letter this morning from the Bank Examiner stating that the attention of his office had been called (supposedly from Sallisaw—there is where he was mistaken) (laughter), had been called to an advertisement of the Sallisaw Bank & Trust Company, in which it agrees to pay 8 per cent interest on deposits. He also advised me that the commissioner has fixed a maximum rate of interest which banks may pay on deposits, and also says that his office has rules that no bank will pay a higher rate than 3 per cent interest.

"In order to comply with my promise made to the public institutions, I will say this, that from now on the bank will pay 3 per cent interest on time deposits, and I personallly, willingly and gladly, will pay the remaining 5 per cent out of my own pocket in cash (loud cheers), and in advance when the deposit is made to the institutions above named only.

"I am a member of the Masonic Order, Odd Fellows, Knights of Pythias, Eastern Star, and the Rebeccas; (loud cheers), and have been for the past fifteen years, and in good standing. (Signed) I. H. Nakideman."

Do you want to hear any more about this interest proposition? I have more.

Mr. F. McGivern—I would like to know whether the National banks are doing any business in Oklahoma?

Mr. Hogan—Plenty of it.

Mr. McGivern—Haven't they lost their deposits?

Mr. Hogan—No, that is a mistake. Get the Comptroller's report and look it up. They lost the State deposit, which is controlled by the political machine and amounted to several millions.

Mr. Levi Kimball—Is it the largest National banks that are surrendering their charters?

Mr. Hogan—No, the smaller ones.

I now hold in my hand an advertisement of a bank at Muskogee, it is in large type, and you can see it from where you sit. This is a bank advertisement of a new bank that has recently been started there. I want to say that Muskogee is Governor Haskell's town. Since the law went into effect the number of banks in that town has increased four, and Governor Haskell's son organized one of them. He called it the Guaranty State Bank. Under the rules of the banking board no bank is allowed to advertise that the State guarantees the deposits. It must advertise that "The deposits of this bank are secured by the gnaranty fund of the State of Oklahoma." This advertisement is taken from the New State Tribune of June 4, 1908, and Governor Haskell is the editor of that paper, and his son is cashier and manager of the bank. It reads as follows: "Four per cent on time and savings deposits." (You can see that from where you are as it is in large type.) "Your deposits guaranteed by State. Send for booklet containing new banking law. Guaranty State Bank, Muskogee, Okla. J. D. Benedict, President, M. G. Haskell, Cashier."

At Yukon, Okla., the State Bank at that place stamped on its certificate of deposit, the following: "All deposits in the Farmers' & Merchants' Bank of Yukon, Okla., are protected by the guaranty fund of the State of Oklahoma."

Mr. Andrew J. Frame, of Wisconsin—Do they put cards in the window?

Mr. Hogan—No, they just cover the windows up. (Applause.)

## LOWERING OF STANDARDS.

There is one more point that I wish to bring out, and that is this: You pass a guaranty law in your State, and immediately there commences, quietly but surely, a lowering of the standard of your bankers. Their individuality is gone. When a bookkeeeper can quit his employer and take charge of a competing bank and say to the public, "My bank is just as strong as the strongest in the State." When that bookkeeper has made a failure at everything he has ever undertaken, then you have a proposition and not a theory, and such are the conditions today in Oklahoma under our

Guaranty Law. The banker who has been in business for years, and knows his business, immediately sees that he must do something. Speculators are beginning to crowd in new banks. We have three new ones in Oklahoma City, and four in Muskogee, so you see the large towns are not overlooked. They all get some deposits. What would you do if you were a banker in Muskogee with four new banks just started?

A Member—Sell out.

Mr. Hogan—Of course you would.

Some months ago I bought a half-interest in the Fletcher State Bank, of Fletcher, Okla. I am telling this because I do not think anybody will object to my giving such information. I was associated with Mr. W. T. Clark, of Apache, Okla., a good banker of twenty-five years' experience, and Mr. E. W. Dilling, who was cashier, a man of ample experience, having worked in the Logan County Bank of Guthrie, and later worked a year in the American National Bank with myself, and I know him to be an able man and a good banker. That bank was sold to us because its former cashier, who was a relative of the owners of the institution, found that he could not make a success of it. He had allowed a man at Apache to overdraw $1,100 that they thought they would never get. He had allowed a cotton man to over draw $400, which account was disputed. These are facts. The result was that my asosciates and I bought the bank. The party that they sought to relieve of the responsibility of cashier retired. The bank has been running for several months. On looking over the furniture and fixtures I found that they had used an old safe that had been placed up against the wall in the vault, and that a hole had rusted through it. That safe is in Oklahoma City today. We immediately changed that safe for a new Manganese No. 3 that cost us about $1,200; and we put in a new system of books, and cleaned up the business in general, and we thought we had a good paying investment. But I could not see that the gauranty law helped us out any. We had about $30,000 deposits. The deposits went up a little after the change.

Professor Laughlin—You did not lose deposits?

Mr. Hogan—We did not lose or gain. Now, the man who lost his place sought in vain to get a position. He tried to hire to us. He had signed a contract that he would not

again enter the business in that town. But this is what he did just before I came to Lincoln. He got out a stock subscription paper, and drove over that country and solicited the farmers, and others, to take stock in a new bank and succeeded in their organizing another bank in the town of Fletcher, which has only 240 people. What would you do if you were in my place there? I can sell out to the new organization, and as there will not be any profit in it to keep it, it is the only thing left to do. This is a striking example of how the law encourages the incompetent and increases the number of banks unduly.

## "APPENDIX C."

In this appendix I have collected a number of representative decisions of this court and of the State courts holding that private property cannot be taken for private use and that, if taken for public use, there must be compensation.

Mr. Justice Gray.

*Mo. Pac. R. Com. Nebraska*, 164. *U. S.* 403; 17 Sup. Ct. Rep. 130-135.

"The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the fourteenth article of amendment of the constitution of the United States."

Mr. Justice Story.

*Wilkinson v. Leland*, 2 Pet. 626, 658; 7 L. Ed. 542, 543.

"We know of no case in which a legislative act to transfer the property of A to B without his consent has ever been held a constitutional exercise of legislative power in any state of the Union. On the contrary, it has been con-

stantly resisted as inconsistent with just principles by every judicial tribunal in which it has been attempted to be enforced."

Mr. Justice Bradley.

*Boyd v. U. S.* 116 U. S. 616, 635; 6 Sup. Ct. Rep. 524.

"Illegitimate and unconstitutianal practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis."

Mr. Justice Matthews.

*Yick Wo v. Hopkins*, 118 U. S. 356, 6 S. C. R. 1064 at 1071.

"* * * the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

Mr. Justice Brown.

*Lawton v. Steele*, 152 U. S. 133, 137, 14 Sup. Ct. Rep. 499, 501.

"The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations."

Mr. Justice Gray.

*Cole v. City of La Grange*, 113 U. S. 1, 5 Sup. Ct. Rep. 416, 418.

## "APPENDIX C."

"The general grant of legislative power in the constitution of a state does not enable the legislature, in the exercise either of the right of eminent domain or of the right of taxation, to take private property, without the owner's consent for any but a public object."

Mr. Justice Harlan.

*Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 558; 22 Sup. Ct. Rep. 431, 438.

"But, as the Constitution of the United States is the supreme law of the land * * * a statute of a state, even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution * * * can be *impaired* or destroyed by a state enactment."

Mr. Justice Harlan.

In *C. B. & Q. R. Co. v. Chicago*, 166 U. S. 226; 17 Sup. Ct. Rep. 581, 586,

Mr. Justice Harlan, after an elaborate examination of the authorities, says:

"In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment * * *"

Mr. Justice McKenna.

*Muhlker v. N. Y. & H. R. Co.*, 197 U. S. 544; 25 Sup. Ct. Rep. 522, 527.

"The permission or command of the state can give no power to invade private rights, even for a public purpose, without payment of compensation * * *"

Mr. Justice Harlan.

*C. B. & Q. v. Illinois*, 200 U. S. 561; 26 Sup. Ct. Rep. 341, 350.

"Private property cannot be taken without compensation for public use under a police regulation relating strictly to the public health, the public morals, or the public safety,

any more than under a police regulation having no relation to such matters, but only to the general welfare."

And again in the same case:

"If the execution of any power, no matter what it is, the government, Federal or State, finds it necessary to take private property for public use, it must obey the constitutional injunction to make or secure compensation to the owner."

Private property cannot be taken for private use under the taxing power.

This proposition is substantially admitted in the opinion and is established by the unanimous concurrence of prior decisions. We quote the following from Vol. 8, Rose's Notes, p. 362, in comment on Loan Association v. Topeka, 20, Wall 655:

"Taxation—There can be no lawful tax which is not laid for a public purpose; therefore, power of taxation cannot be exercised in aid of enterprises strictly private, though remotely or collaterally, the local public may be benefited thereby, p. 664."

Following are the citing cases approving and relying upon this holding: Missouri, etc., Ry. Co. v. Nebraska, 164 U. S. 417, 41 L. 495, 17 S. Ct. 135, in holding state cannot take property of one person, without owner's consent, for use of another person; Garland v. Board of Revenue, 87 Ala. 227, 6 So. 403, holding act authorizing building of railroad bridge by county and issuance of bonds to pay for same, invalid. McClelland v. State, 138 Ind. 332, 37 N. E. 1092, holding statute for relief of school trustee invalid, taxation being necessary to accomplishment object thereof; State v. Osawakee Township, 14 Kan. 420, 428, 19 Am.

Rep. 100, 105, holding act providing for bond issue to aid destitute farmers invalid; Blain v. Riley Co. Agricultural Society, 21 Kan. 560, refusing mandamus to treasurer upon authority of last citation; Atchison, etc., R. R. Co. v. Atchison, 47 Kan. 714, 28 Pac. 1001, holding tax levied in aid of private sectarian colleges, void; Geneseo v. Geneseo Gas Co., 55 Kan. 362, 40 Pac. 656, holding law authorizing cities to encourage development of coal, etc., by subscribing to stock of companies developing same, invalid; Lancaster v. Clayton, 86 Ky. 380, 5 S. W. 867, holding agreement by city to exempt hotel, when built, from taxation, invalid; though hotel was built on faith therein; Baltimore, etc., R. R. Co. v. Spring, 80 Md. 517, 31 Atl. 210, 27 L. R. A. 74, holding unconstitutional an act levying tax to pay certain persons' debts due them from insolvent railroad; Kingman v. Brockton, 153 Mass. 259, 26 N. E. 999, 11 L. R. A. 125, and holding unconstitutional act authorizing city to appropriate money for erection of Grand Army building; Opinion of Justices, 155 Mass. 601, 603, 30 N. E. 1144, 15 L. R. A. 810, 811, holding legislature powerless to authorize towns to buy fuel for purpose of sale to inhabitants; State v. Foley, 30 Minn. 356, 15 N. W. 378, holding legislature cannot compel taxation to refund money paid on tax sale; Deal v. Mississippi Co. 107 Mo. 469, 18 S. W. 25, 14 L. R. A. 623, holding provision for bounty for planting trees, invalid; State v. Switzler, 143 Mo. 314, 316, 317, 318, 65 Am. St. Rep. 658, 660, 661, 45 S. W. 248, 249, 40 L. R. A. 285, 286, holding act directing proceeds of inheritance tax to be devoted to establishment of free scholarship at State Uni-

versity, void; Manning v. Kippel, 9 or 370, holding law establishing special fees for officers in certain counties, only local tax law and invalid; Feldman v. City Council, 23 S. C. 63, 64, 67, 55 Am. Rep. 9, 10, 12, holding bonds issued and loaned to sufferers from Charleston fire, to enable them to rebuild, invalid; Maudlin v. City Council, 53 S. C. 293, 69 Am. St. Rep. 860, 31 S. E. 254, 43 L. R. A. 104, holding act authorizing taxation of owners of lots on certain street for improvement thereof, unconstitutional; Williams v. Davidson, 43 Tex. 37, holding city cannot contract with individual to erect bridge, to be paid for by unequal tolls; Brooke Academy v. George, 14 W. Va. 420, 422, 424, 35 Am. Rep. 762, 764, 765, holding act appropriating money bequeathed to state to private academy, void; Pittsburgh, etc., R. R. v. Iron Works, 31 W. Va. 734, 8 S. E. 466, 2 L. R. A. 690, and holding property cannot be condemned for branch railroad to private factory; Wisconsin Keeley Institute v. Milwaukee County, 95 Wis. 161, 60 Am. St. Rep. 110, 70 N. W. 71, 36 L. R. A. 59, holding act providing for maintenance of drunkards at private institution, invalid; dissenting opinion in Hope v. Board of Liquidation, 43 La. Ann. 780, 9 So. 769, holding bonds in effect issued in aid of bank, and, therefore, void, majority contra; State v. Sargent, 12 Mo. App. 241, holding tax sale under judgment against several lots, must be stopped when sheriff has received amount due, majority holding entire tract may be sold."

Kent, Vol. 2, 339:

"The right of eminent domain, or inherent sovereign power, gives to the legislature the control of private prop-

erty for public uses, *and public uses only;*" and on page 340, "but if they should take it for a purpose not of a public nature, as, if the legislature should take the property of A and give it to B, or if they should vacate a grant of property or of a franchise, under the pretext of some public use or service, such cases would be *gross abuses* of their discretion and fraudulent attacks on private right and the law would be clearly unconstitutional and void."

Ala.

*L. & N. R. Co. v. Baldwin*, 5 So. 311, 312.

"Private property shall not be taken for private use. These are constitutional guaranties, and corporations are as much under their protection as natural persons are."

Ala.

*Sadlin v. Langham* and *Moore v. Wright and Rice*, 34 Ala. 311, 330.

"The legislature cannot, either with or without compensation, take private property for private uses."

Cal.

*Billings v. Hall*, 7 Cal. 1, 10.

"Such legislature is repugnant to the plainest principles of morality and justice, and is violation of the spirit and letter of our constitution. It diverts vested rights, attempts to force the property acquired by honest industry of one man and confer it upon another, who shows no meritorious claim in himself.' '

Conn.

*Enfield T. B. Co. v. Hartford R. R. Co.*, 42 Am. Dec. 716, 727.

"Besides, if the defendants claim this, as matter of their own accommodation, and not a matter of public interest, then the charter, by which they claim to take the lands of individuals for their railroad, without their consent, is invalid, and their grant worthless, as it would be taking private property for private (not for public) use."

Ga.

In Wilder v. Lumpkin, 4 Ga. 215, it is said: "* * the fundamental principles of the social compact and free government require that private rights be held sacred."

Ind.

*Great Western, etc., Gas Co. v. Hawkins*, 30 Ind. Ap. 566, 66 N. E. 765, 768.

"If a legislative act assumes to authorize the seizure of the property of one citizen for the benefit of another, it cannot be upheld."

*Blockman v. Holms*, 72 Ind. 515,.

"The right of eminent domain can only be invoked for the compulsory taking or the enforced appropriation of private property when some public exigency requires the exercise of that sovereign right."

Iowa.

*Banshead v. Brown*, 25 Iowa 540.

"The constitutional limitation contained in our bill of rights prohibits, by implication, the taking of private property for any *private use whatever*, without the consent of the owner."

Kan.

*Harding v. Funk*, 8 Kan. 315, 323.

"There is only one reason given why such an act is not in its nature and essence a law, and that reason is that such an act provides for taking private property for private *use*. We suppose that it will be admitted that, if the act does provide for taking private property for private uses solely it is unconstitutional."

Ky.

*Bank of Louisville v. Board of Trustees*, 5 S. W., 735, 737.

"* * * it seems to us there can be but little question but what our plain duty requires us to say that an act which takes the property of one person and gives it to another, however worthy may be its objects * * * is forbidden by both natural equity and constitutional law."

Maine.

*Alllen v. Inhabitants of Jay*, 11 Am. Rep. 185, 197.

"The constitutional provision that private property shall not be taken for public uses without just compensation,

nor unless the public exigencies require it, by necessary implication prohibits the taking of private property for private purposes by legislative action."

Md.

*Regents v. Williams*, 31 Am. Dec. 72, 97.

"To say that the legislature possesses the power to pass conspicuously or at pleasure a valid act, taking from one his property and giving it to another, would be in this age and in this state a startling proposition, to which the assent of none could be yielded, and yet there is nothing to forbid it, if it is once conceded that they have the power to dissolve one corporation, and take from it its franchises and property, without its consent, and transfer them to another."

Mass.

*Lowell v. City of Boston*, 15 Am. Rep. 39, 56.

"The expenditure authorized by this statute being for private and not for public objects, in a legal sense, it exceeds the constitutional power of the legislature. * * *"

Mich.

*Mich. Sugar Co. v. Auditor General*, 83 Am. St. Rep. 354, 357.

"Under the express terms of the constitution, private property cannot be taken for private use, even with compensation, without the owner's consent, nor can it be taken for public use without just compensation."

Minn.

*Coates v. Campbell*, 35 N. W. 366.

"There is no principle of constitutional law better settled than that taxes cannot be imposed for a private purpose."

Minn.

*State v. County of Washington*, 15 N. W. 375, 379.

"Property which the owner is entitled to enjoy and control for his own benefit may not be transferred to another by an act of the legislature, even though it is provided that security shall be afforded for reimbursement."

Miss.

*Moody v. Hoskins*, 1 So. 622, 623.

"This presents the question, can the legislature, after a sale for taxes under a law which secures to the owner the right to redeem the land, take away and destroy this right? We answer in the negative. To admit such a right is to concede the power to transfer valuable right from one to another by the easy process of legislative declaration."

Mo.

*Newby v. Platte County*, 25 Mo. 258, 261.

"No principle in English jurisprudence is better settled than that an individual cannot be deprived of his property except for the public use and for a just compensation, and the British Parliament accordingly never authorized one individual's property to be taken for the private benefit of another upon any terms, nor for the public use, without first providing a just equivalent for the owner. (1 Black Com. 139.) The emphatic declaration of the French law (Civil Code, Art. 545) is that 'no one can be compelled to give up his property except for the public use and for a just and previous indemnity.' And an anecdote related by De Tatt, in his Memoirs of the Turkish Government, shows that the same principle is equally respected in that despotic government. The Sultan Mustapha, being desirous of building and endowing a new mosque, fixed upon a spot in the city of Constantinople which belonged to a number of individuals, and treated with them for the purchase of their parts. They all complied with his wishes except a Jew, who owned a small house on the place, and refused to part with it for any price. The Sultan consulted his mufti, and they answered that private property was sacred, and that the laws of the Prophet forbade his taking it absolutely, but that he might compel the Jew to lease it to him as long as he pleased at a *full rent*. The Sultan submitted to the law."

Mo.

*Dickey v. Tennison*, 27 Mo. 373.

"Private property cannot constitutionally be condemned and appropriated by the legislature to private use."

Neb.

*A. & N. R. R. Co. v. Baty*, 29 Am. Rep. 356, 362.

"And whatever the object of such legislation may be, it eventuates in a decree taking property from one man and giving it to another; but such legislation is repugnant to the fundamental principles of individual rights, the maxims of

the common law, and the constitutional limitations, and therefore it cannot be 'the law of the land.'"

N. J.

*Ten Eyck v. D. & R. Canal Co.*, 37 Am. Dec. 233.

"The state may by virtue of its right of eminent domain, take private property or destroy private rights, for public purposes, upon making just compensation, but *can not* do this for private purposes, without the consent of the owner."

N. J.

*Coster v. Water Co.*, 18 N. J. Eq. 54, 63.

"Taking the property of one man and giving it to another is not making a law or rule of action, it is not legislation, it is simply robbery."

N. Y.

*Taylor v. Porter*, 40 Am. Dec, 274.

"Private property cannot be taken for a private purpose, without consent of the owner."

N. Y.

*Bloodgood v. Mohawk & H. Ry Co.*, 31 Am. Dec. 313, 316.

"In the subsequent case of Varich v. Smith, et al, (28 Am. Dec. 417) I also arrived at the conclusion that this right of eminent domain did not authorize the government to take the property of one citizen for the mere purpose of transferring it to another, even for a full compensation, where the public was not interested in such a transfer; and that such arbitrary exercise of power would be an infringement of the spirit of the constitution, as not being within the powers delegated by the people to the legislature."

N. Y.

*Embury v. Conner*, 3 N. Y. 515, 517.

"I think these decisions should be regarded as having settled the point that a statute is unconstitutional and void which authorizes the transfer of one man's property to another without the consent of the owner, although compensation is made."

Ohio.

*Reeves v. The Treas.*, 8 O. St. R., 333, 347.

"But we are unanimously of the opinion that the act does authorize the appropriation of private property for private purposes * * * without the consent of the owner, and is therefore in contravention of the 19th Section of the bill of rights."

Ohio.

*Lamb & McKee v. Lane*, 4 Ohio State 167, 178.

Speaking of the taking of private property by the state:

"It is only by an exercise of her right of eminent domain that it can be taken at all; * * * However taken, it must be for a public use; for no corporation can take it for a mere private use unconnected with any public purpose."

Ohio.

*Auditor of Lucas County v. State ex rel Bayles*, 78 N. E. 955.

"An act to provide relief for the worthy blind * * * by giving them so much quarterly from the county treasury is unconstitutional, for the reason that it requires the expenditure for a private purpose of public funds raised by taxation."

Ore.

*Witham v. Osburn*, 4 Or. 218, 18 Am. Rep. 287, 290.

"Having reached the conclusion that the legislature exceeded its authority under the constitution, in authorizing the establishment of private roads over the land of an individual, without his consent, for the private use of another, we therefore hold that so much of such statute as authorizes the location of such road is void."

Pa.

*Sharpless v. Mayor, etc.*, Phil., 21 Pa. St. 147, 169.

"Transferring money from the owners of it into the possession of those who have no title to it, though it be done under the name and form of a tax, is unconstitutional for all the reasons which forbid the legislature to usurp any other power not granted to them."

S. C.

*Feldman v. City Council of Charleston,* 55 Am. Rep. 6, 9.

"* * * We think there can be no doubt that even in the absence of any express restriction upon the taxing power of the legislature such power can only be exercised for some public purpose, and whenever it is attempted to be exercised for a private purpose, it is the duty of the courts to declare such legislature void."

Tenn.

*Harding v. Goodlett,* 11 Tenn. (3 yerg) 33, 43.

"The saw mill and paper mill have no public character. The erection of these mills would be wholly for the private use of these petitioners. To take Harding's land for such use would be unconstitutional."

Tenn.

*Clack v. White,* 32 Tenn. (2 Suan..) 540, 549.

"On the contrary, we consider it a settled doctrine that a law which is intended to have the effect to transfer the private property of one man to another, against his will, is powerless and void, no matter under what pretext of policy or convenience it may be made."

Tex.

*Delworth v. State,* 36 S .W. 2745.

"There is no rule of law in this state, constitutional or otherwise, but what prohibits, or ought to prohibit, the taking of private property of one individual for the private use of another individual or set of individuals."

Wis.

*State v. Froehlich,* 99 Am. St. Rep. 985.

"The legislature has no power to compel, or to authorize, a county or other municipality to raise money by taxation to be paid to private persons for a purely private purpose."

Wyo.

*U. S. v. Douglas-Willan Sartoris Co.,* 22 Pac. 92. 96.

"But that power has neither the legal nor the moral

right to exact a tribute from one citizen to build up the trade or the fortunes of another; and, whatever may be the mask under which such legislation is hidden, a court of justice will seize the disguise and brand the enactment as robbery under the form of law."